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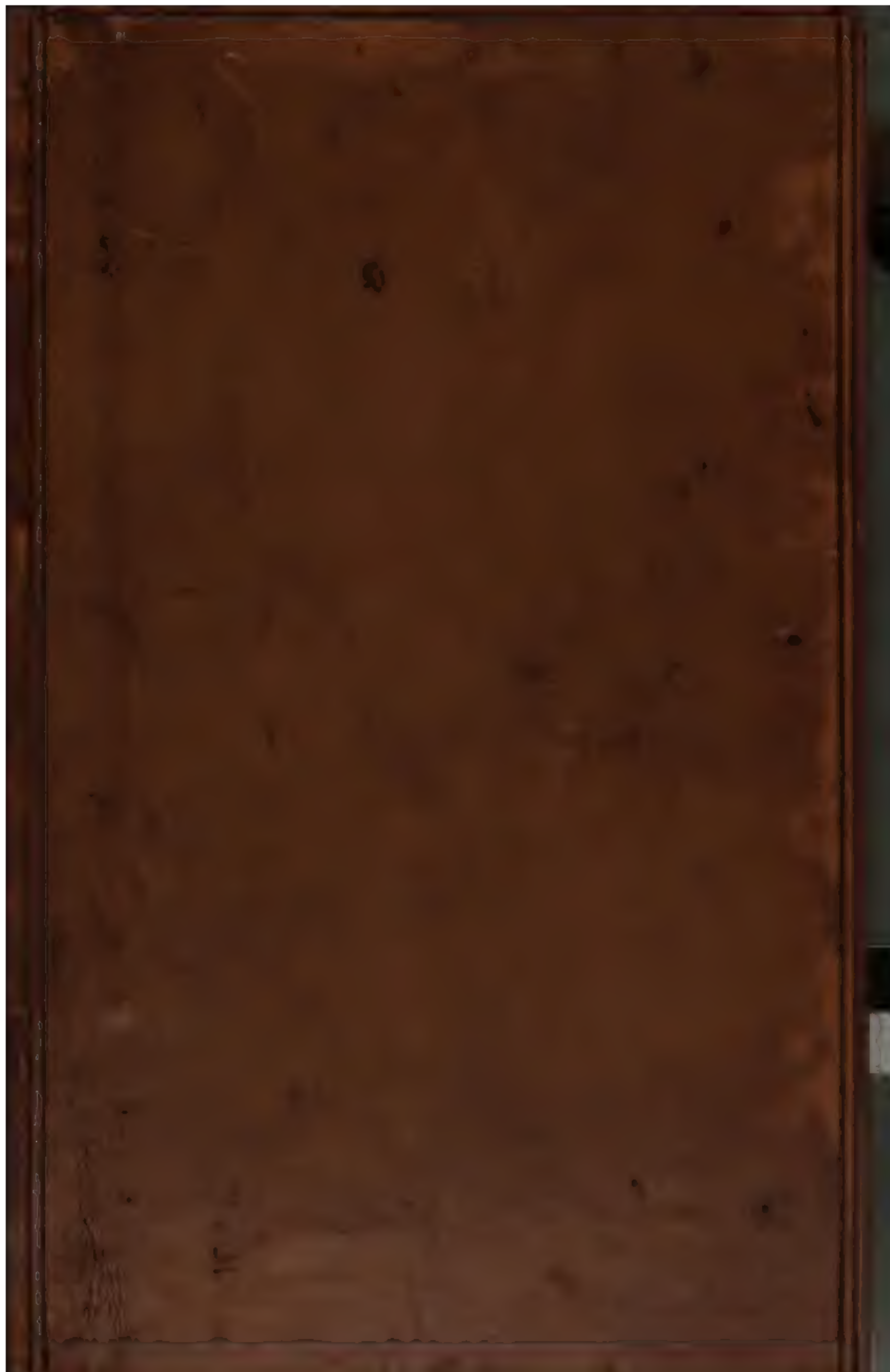
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REPORTS OF CASES,

ARGUED AND DETERMINED

IN THE

Court of Criminal Appeal,

FROM

MICHAELMAS TERM, 1848, to MICHAELMAS TERM, 1851.



BY

LEOFRIC TEMPLE, OF LINCOLN'S INN, ESQ.

AND

GEORGE MEW, OF THE MIDDLE TEMPLE, ESQ.

BARRISTERS-AT-LAW.



VOL. I.

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Cancel page vii. of RULES AND ORDERS, and substitute the last leaf of sig. Y Y

A P P E N D I X.

STATUTE 11 & 12 VICT. c. 78.

An Act for the further Administration of the Criminal Law.
[31st August, 1848.]

I. WHEREAS it is expedient to provide a better mode than that now in use of deciding any difficult question of law which may arise in criminal trials in any court of oyer and terminer and gaol delivery, and to make further amendments in the administration of the criminal law: Be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That when any person shall have been convicted of any treason, felony, or misdemeanor, before any court of oyer and terminer or gaol delivery, or Court of Quarter Sessions, the judge, or commissioners, or justices of the peace, before whom the case shall have been tried, may in his or their discretion reserve any questions of law which shall have arisen on the trial for the consideration of the Justices of either Bench and Barons of the Exchequer, and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question shall have been considered and decided as he or they may think fit; and in either case, the Court in its discretion shall commit the person convicted to prison, or shall take a recognizance of bail with one or two sufficient sureties, and in such sum as the Court shall think fit conditioned to appear, at such time or times as the Court shall direct, and receive judgment, or to render himself in execution, as the case may be.

Questions of law may be reserved at sessions of the peace for consideration of Judges.

II. And be it enacted, That the judge or commissioner, or the Court of Quarter Sessions, shall thereupon state, in a case signed

Questions reserved to be certified to the judges.

in the manner now usual the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen, and such case shall be transmitted to the said justices and barons ; and the said justices and barons shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record that in the judgment of the said justices and barons the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other session of oyer and terminer or gaol delivery, or other sessions of the peace, if no judgment shall have been before that time given as they shall be advised, or to make such other order as justice may require ; and such judgment and order, if any, of the said justices and barons shall be certified under the hand of the presiding Chief Justice or Chief Baron, to the Clerk of Assize or his deputy, or to the Clerk of the Peace or his deputy, as the case may be, who shall enter the same on the original record in proper form ; and a certificate of such entry under the hand of the Clerk of Assize or his deputy, or the Clerk of the Peace or his deputy, as the case may be, in the form as near as may be, or to the effect mentioned in the schedule annexed to this act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or gaoler in whose custody the person convicted shall be, and the said certificate shall be a sufficient warrant to such sheriff or gaoler and all other persons for the execution of the judgment, as the same shall be so certified to have been affirmed or amended, and execution shall be thereupon executed on such judgment ; and for the discharge of the person convicted from further imprisonment if the judgment shall be reversed, avoided, or arrested, and in that case such sheriff or gaoler shall forthwith discharge him, and also the next court of oyer and terminer and gaol delivery, or sessions of the peace shall vacate the recognizance of bail, if any ; and if the court of oyer and terminer and gaol delivery, or Court of Quarter

Sessions, shall be directed to give judgment, the said Court shall proceed to give judgment at the next session.

III. And be it enacted, That the jurisdiction and authorities by this Act given to the said Justices of either Bench and Barons of the Exchequer, shall and may be exercised by the said Justices and Barons, or five of them at the least, of whom the Lord Chief Justice of the Court of Queen's Bench, or the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer, or one of such chiefs at least, shall be part, being met in the Exchequer Chamber or other convenient place; and the judgment or judgments of the said justices and barons, shall be delivered in open court after hearing counsel; or the parties, in case the prosecutor or the person convicted, shall think it fit that the case shall be argued in like manner as the judgments of the superior Courts of common law, at Westminster or Dublin, as the case may be, are now delivered.

Quorum of Judges; their judgments to be delivered in open court.

IV. And be it enacted, That the said Justices and Barons, when a case has been reserved for their opinion, shall have power if they think fit to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly and judgment shall be delivered after it shall have been amended.

Case or certificate may be sent back for amendment.

V. And be it enacted, That whenever any writ of error shall be brought upon any judgment on any indictment, information, presentment, or inquisition in any criminal case, and the Court of error shall reverse the judgment, it shall be competent for such Court of error, either to pronounce the proper judgment or to remit the record to the Court below, in order that such Court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition.

If judgment be reversed on writ of error, record may be remitted to Court below for judgment.

VI. And be it enacted, That every person who shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any certificate of, or copy certified by a Chief Justice, or any certificate of, or copy certified by a clerk of assize or

Punishment for forgery.

his deputy, or the clerk of the peace or his deputy, as the case may be, with intent to cause any person to be discharged from custody, or otherwise prevent the due course of justice, shall be guilty of felony; and, being convicted thereof, shall be liable at the discretion of the Court to be transported beyond the seas for any term not exceeding ten years, or to be imprisoned for any term not exceeding three years, with or without hard labour and solitary confinement; both or either at the discretion of the Court before which he shall be tried.

Extent of Act. VII. And be it enacted, That this Act shall not extend to Scotland.

Act may be amended, &c. VIII. And be it enacted, That this Act may be amended or repealed by any act to be passed during this present session of parliament.

SCHEDULE.

Whereas, at the session of the peace for the county of
held on , before
and others, their fellows; [or at the session of
oyer and terminer and gaol delivery, held for the county of
on before (among others)
Sir A. B., knight, one of the justices of the Court of
and here name the quorum commissioners,
justices of oyer and terminer and gaol delivery,] A. B., late of
labourer, having been found guilty of felony,
and judgment thereupon given, that [state the substance], the
Court before whom he was tried reserved a certain question of
law for the consideration of the Justices of either Bench and the
Barons of the Exchequer, and execution was thereupon respited;
in the mean time

This is to certify, that the said Justices and Barons having met
in the Exchequer Chamber at Westminster, (or Dublin, as the case
may be) on the day of it was considered
by the said Justices and Barons there, that the aforesaid judgment
should be annulled, and an entry made on the record that the
said A. B. ought not, in the judgment of the said Justices and

Barons, to have been convicted of the felony aforesaid ; and you are therefore hereby required forthwith to discharge the said A. B. from your custody.

To the gaoler of _____, and the sheriff of _____
and all others whom it may concern.

Signed (E. F.)

Clerk of the peace for the county of _____
[or clerk of the assize for _____ as the case
may be].

RULES AND ORDERS (a).

COURT FOR CROWN CASES RESERVED.

Extract from
statute, sect. 1.

WHEREAS by an Act made and passed in the 11th and 12th years of the reign of her present Majesty, intituled “An Act for the further Amendment of the Administration of the Criminal Law,” it is, amongst other things, enacted, That when any person shall have been convicted of any treason, felony, or misdemeanor, before any Court of Oyer and Terminer, or gaol delivery, or Court of Quarter Sessions, the Judge, or Commissioner, or Justices of the Peace, before whom the case shall have been tried, may, in his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration of the Justices of either Bench and Barons of the Exchequer.

Extract from
statute, s. 2.

That the Judge, or Commissioner, or Court of Quarter Sessions, shall thereupon state, in a case signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen, and such case shall be transmitted to the said justices and barons.

It is expedient
to make regula-
tions.

And whereas it is expedient that regulations be made for the convenience of the Court established under the said recited Act :

Original case,
and seventeen
copies, to be
delivered to the
clerk of the
Court at least
four days
before the
sittings.

It is ordered that, when any case shall be transmitted by a Court of oyer and terminer, or gaol delivery, or Court of Quarter Sessions, for the consideration of this Court, the original case, signed by the judge, or commissioner, or chairman of sessions, reserving the question of law, and seventeen copies of such case, one for each judge and one for each party, shall be delivered to the clerk (b) of this Court, at the Exchequer Chamber, West-

(a) These rules and regulations were published on Saturday, June 1st, 1850.

(b) Richard Morris, Esq.

minster, at least four days before the day appointed for the sitting of the said Court.

That every case transmitted for the consideration of this Court briefly state the question or questions of law reserved, and such facts only as raise the question or questions submitted; if the question turn upon the indictment or upon any count thereof, then the case must set forth the indictment or the particular count.

Case to be stated briefly.

That no case be heard upon any demurrer to the pleadings.

Cases not to be stated upon demurrers.

That every case shall state whether judgment on the conviction was passed, or postponed, or the execution of the judgment respited, and whether the person convicted be in prison or has been discharged on recognizance of bail to appear and receive judgment, or to render himself in execution.

Case to state whether the prisoner was convicted, &c.

That when any case is intended to be argued by counsel or by the parties, notice thereof be given to the clerk of this Court at least two days previously to the sitting of the said Court.

Notice to be given when counsel will appear.

That with every case delivered to the Judges of this Court (except such cases as shall be reserved by such Judges), the fee payable to the clerks of the said Judges shall not exceed the fee payable on "demurrer and other paper books," as contained in the table of fees allowed and sanctioned by the Judges, pursuant to stat. 1 Vict. c. 30.

Fees to Judges' clerks.

(Signed)

CAMPBELL.	R. M. ROLFE.
THOS. WILDE.	WM. WIGHTMAN.
FRED. POLLOCK.	C. CRESSWELL.
J. PARKE.	W. ERLE.
E. H. ALDERSON.	T. J. PLATT.
J. PATTESON.	E. V. WILLIAMS.
J. T. COLERIDGE.	T. N. TALFOURD.

POINTS OF PRACTICE.

"A CONVICTION" is a condition precedent in all cases to give jurisdiction to this Court . . . P. 289

The Court will not entertain any question which is not reserved in the case (p. 24), even though it should be fairly deducible from the case itself . . . P. 214; and see p. 316, n.

The Court will not consider an objection to the validity of an indictment if it be not reserved and the indictment be not set out in the case itself . . . Pp. 24, 37

The Court upon a case reserved, in which the indictment is set out, will look at the indictment, and if bad reverse the judgment . . . Pp. 26, 37

The Court will not go into any matter of evidence which occurred at the trial, if it is not referred to in the case . . . Pp. 214, 256, 346

The Court will not except; perhaps, under extreme circumstances, send a case back to be amended . . . Pp. 40; 179, n.; 270, n.; 318, n.

The Court will not send a case back to be amended in order to raise a point (not reserved) whether a certain question should have been left to the jury . . . P. 214

Before a case is submitted to this court counsel may apply to the Judge, by whom it is stated, to amend . . . Pp. 214, 347, n.

A case reserved in term after this Court has begun to sit, (*usually the second Saturday in term,*) properly belongs to the next rota . . . P. 270, n.

If a case reserved by a Judge of one of the superior Courts should be called on when such Judge is not present, it will be adjourned until he be present; although a Judge who was present at the trial, and therefore acquainted with the facts, should be one forming this Court, and present when the case is so called on . . . P. 342; but see p. 286

An objection to an indictment raised in arrest of judgment may be submitted to this Court . . . P. 81

A point which has been decided upon demurrer in the Court below cannot be reserved for this Court . Pp. 179, 286

(*Semble.*) When by arrangement no judgment is at the trial given upon a demurrer, which does not appear upon the record, and the case goes on, and the prisoner is convicted, the point raised upon demurrer may be reserved. [*See however Rules of Court, supra, vii.*] . . . Pp. 155—288

One counsel only can be heard on each side . P. 342

Counsel for the prisoner address the Court first, and have a reply

This Court will consider the case reserved and give judgment, although no counsel should appear on either side

Counsel will be heard in support of the conviction, although no counsel should appear on behalf of the prisoner P. 81

So, by counsel for the prisoner, although no counsel should appear for the Crown

(*Semble.*) There is no appeal from this Court by a writ of error . . . P. 286

REPORTS OF CASES,
ARGUED AND DETERMINED
IN THE
Court of Criminal Appeal.

MICHAELMAS TERM,
IN
THE TWELFTH YEAR OF THE REIGN OF VICTORIA.

CORAM

POLLOCK, C. B.,
PATTESON, J.,

MAULE, J.,
CRESSWELL, J.,

ERLE, J.

IN THE EXCHEQUER CHAMBER.

REG. v. ORLANDO MASTERS.

EMBEZZLEMENT.

THE Recorder of Birmingham respectfully submitted for the consideration of the learned Judges, two questions of law.

“1. Whether, under the 11 & 12 Vict. c. 78, s. 1 and 2, questions of law may be reserved by Recorders?

“2. Whether the conviction of Orlando Masters was a good conviction?

“As to the first question, the power to reserve is not in express terms given to Recorders; and it may be contended that the Courts of Quarter Sessions mentioned in the Act are Courts composed of justices of the peace. On the other hand, it may be replied, that the 1st section, when enumerating the Courts to which the power is given,

same employment, and B. fraudulently retained such money, it was held to be an embezzlement within 7 & 8 Geo. IV. c. 29, s. 47.

1848.

Saturday,
Nov. 11.

The Recorder of a borough has power under the 11 & 12 Vict. c. 78, to reserve questions of law for the consideration of the Judges.

Where money had been received by A., a servant, on account of his master, and by him paid over to B., a fellow-servant, whose duty it was to pay it over again to C., the cashier in the

1848.

REG. v.
MASTERS.

uses the word ‘any,’ which would seem to override the whole class enumerated, and, consequently, apply to the Courts of Quarter Sessions, and that the 2nd section enacts that the Court of Quarter Sessions shall state the case. In boroughs this Court consists of the Recorder sitting as judge (5 & 6 Wm. IV., c. 76, s. 105). He is moreover *ex officio* a justice of the peace (s. 103). It would thus appear that Borough Sessions are within the words of the Act, and the absence of any express distinction between County Sessions and Borough Sessions might be urged to show that no such distinction was intended. Indeed, it would be difficult, if not impossible, to find any motive for withholding a power from Recorders’ Courts which is thought necessary to the due administration of justice in Courts exercising a similar jurisdiction.

“As to the second question, the case is as follows:—

“Orlando Masters, a clerk in the employment of William Holliday, was tried at the last Michaelmas Quarter Sessions for the Borough of Birmingham, on an indictment charging him with embezzling three sums of money received by him for and on account of his master the prosecutor.

“It appeared in evidence, that the course of business adopted by the house was for the customers to pay moneys into the hands of certain persons, who paid them over to a superintendent; he accounted with the prisoner, and paid over such moneys to him, and the prisoner in his turn accounted with cashiers, and paid over the moneys to them, he having no other duty to perform with respect to such moneys than to keep an account which might act as a check on the superintendent and the cashiers, their accounts being in like manner checks upon him. These four parties to the receipt of the moneys are all servants of the prosecutor.

“With respect to the three sums in question, it was

proved that they passed in due course from the customers, through the hands of the immediate receivers and the superintendent, to the prisoner, who wilfully and fraudulently retained them.

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 REG. v.
MASTERS.

“ On behalf of the prisoner it was objected, on the authority of *Rex v. Murray*, 1 Moody’s C. C., 276 (a), that the moneys having, before they reached the prisoner, been in the possession of the prosecutor’s servants, did in law pass to the prisoner from his master, and that consequently the charge of embezzlement could not be sustained. For the Crown it was answered that the prisoner having intercepted the moneys in their appointed course of progress to the master, this case was not governed by that of *Rex v. Murray*, where the prior possession of the master having been as complete as it was intended to be, the money might reasonably be considered as passing from the master to the prisoner; whereas in the present case it was in course of passage through the prisoner to the master.

“ The Recorder left the case to the Jury, reserving the point.

“ The prisoner was convicted, and sentenced to twelve months’ imprisonment, with hard labour.

(Signed) “ M. D. HILL,

“ Nov. 3, 1848. “ Recorder of Birmingham.”

Miller, on the part of the Crown, submitted, first, whether under the statute 11 & 12 Vict., c. 78, s. 1, the Recorder had power to reserve a point of law. By that section it is enacted, “ that when any person shall have been convicted of any treason, felony, or misdemeanour, before any Court of Oyer and Terminer, or Gaol Delivery, or Court of Quarter Sessions, the judge, or commissioner, or justices of the peace, before whom the case shall have been tried, may, in his or their discretion,

(a) 1 R. M. & M. 276. See also 5 C. & P. 145, S. C.

1848.

 REG. v.
MASTERS.

reserve any question of law which shall have arisen on the trial for the consideration of the Justices of either Bench of the Barons of the Exchequer, and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question shall have been considered and decided as he or they may think fit." By sect. 2, it is enacted, "that the judge, or commissioner, or Court of Quarter Sessions, shall thereupon state, in a case signed in the manner now usual (a), the question or questions of law which shall have been so reserved, with¹ the special circumstances, upon which the same shall have arisen." These sections do not in express terms refer to the Recorder of a Borough, but they mention 'any Court of Quarter

(a) The usual practice (which was confined to the superior judges) has been that when the judge presiding at the trial has had any doubt upon a point of law, he has reserved it for the consideration of the other Common-law Judges of Westminster Hall, who usually met for the consideration of Crown cases, on the second Saturday in each term. If the case was to be argued on either side by counsel, the Judges assembled in the Exchequer Chamber, but if no counsel appeared they deliberated in their private room. The case, upon which the point of law arose, was drawn up by the learned Judge, and a copy thereof signed by him was submitted to each of the Common-law Judges, usually on the first day of the ensuing term. The Court constituted under the new Act, the 11 & 12 Vict. c. 78 (which extends to any Court of Oyer and Terminer or Gaol Delivery, or Court of Quarter Sessions) has not at present issued any rules of practice. But as the Act refers to the manner heretofore usual, it appears that the proper course is for the presiding Judge of the Court in which the trial takes place to draw up as short a statement of the point of law as he conveniently can, omitting all matters of fact, and other matters of general evidence, not necessary to elucidate the point of law submitted. *The Court to which it is referred not being constituted to inquire into any matters of fact.* Fifteen copies, signed by the Judge submitting the case, should be transmitted at the earliest opportunity to the Master* of the Court of Criminal Appeal, Exchequer Chamber, Westminster Hall. No fees are payable on delivery. The case is not usually submitted to the counsel engaged; but on application to the Judge it is usually furnished.

* No officer is provided for this Court by the statute. This omission in the Act will, in all probability, be remedied during the present Session of Parliament. The duties have hitherto, *pro tempore*, been efficiently and courteously performed by Richard Morris, Esq., Assistant Master of the Court of Exchequer.

Sessions,' and in boroughs this Court of Quarter Sessions consists of a Recorder sitting as sole judge. By 5 & 6 Will. IV. c. 76, s. 105, it is enacted, "that the *Recorder* of every borough shall hold once in every quarter of a year, or at such other and more frequent times as the said Recorder in his discretion may think fit, or as his Majesty shall think fit to direct, a Court of *Quarter Sessions* of the peace in and for such borough, of which Court the *Recorder* of such borough shall *sit as the sole judge*; and *such Court of Quarter Sessions of the peace* shall be a Court of Record, and shall have cognizance of all crimes, offences, and matters whatsoever, cognisable by any Court of Quarter Sessions of the peace for counties in England; and the said Recorder shall have power to do all things necessary for exercising such jurisdiction, notwithstanding his being such sole judge, as fully as any such last-mentioned Court." Moreover, the Recorder is *ex officio* a justice of the peace.

1848.

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MASTERS.

Secondly, whether this was an embezzlement within the meaning of 7 & 8 Geo. IV. c. 29, s. 47.—By that section it is enacted "that if any clerk, or servant, or any person employed for the purpose, or in the capacity, of a clerk, or servant, shall, by virtue of such employment, receive or take into his possession any chattel, money, or valuable security, for or in the name, or on the account of his master, and shall fraudulently embezzle the same or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such money, chattel, or security was not received into the possession of the master, otherwise than by the actual possession of his clerk, servant, or other person so employed." The prisoner was employed as the servant of the prosecutor, and received the money in pursuance of such employment for and on account of his master, and fraudulently withheld it, and converted it to his own use. This case was clearly one of embezzlement, and altogether distinguishable from *Rex v. Murray*,

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for there the prior possession by the master was complete ; and, therefore, the money might be considered as passing from the master to the servant ; but here the master never had complete possession. The statute applies in all cases where a man who has received money for and on account of his master, neglects to account for it, and fraudulently converts it to his own use. This case was of that description, and came clearly within the very words of the statute. (a).

POLLOCK, C. B.—This case differs from *Rex v. Murray*. Here the money was in course of passage through the prisoner to the master. The prisoner was one of those whose duty it was to receive the money in its transit, and pay it over. He did receive it and did not pay it over, but embezzled it : the conviction is therefore right.

PATTESON, J.—I am of the same opinion. As to the power of the Recorder to reserve a case, that is perfectly plain. He is a justice of the peace, and therefore within the statute.

MAULE, CRESSWELL, and ERLE, JJ. concurred.

Conviction affirmed.

(a) No counsel appeared for the prisoner.



REG. v. ELIZABETH GARNER.

1848.

*Saturday,
Nov. 11.*

CONFESSION.

THE prisoner, Elizabeth Garner, a girl 13 years of age, was indicted and tried at the Lincoln Summer Assizes, 1848, before Patteson, J., for administering poison to her mistress, Mary Smith, with intent to murder her. In order to prove the fact a medical man, a Mr. Gilby, was called, to whom the prisoner in the presence of her mistress had made a confession.

Before the evidence was admitted, Gilby, in answer to questions put to him, said that he did not tell the prisoner that it would be better or worse for her to tell; that neither he nor any one else had made use of any threats or promises to induce her to confess. The following evidence was then received. "I asked her if she had given the woman any thing in her milk. She said she had mixed some fag-water with the milk: she had put in half a tea-cupful. I asked her if she was aware of the nature of it. She said she knew it was poison; she thought it would kill the woman; that she had done it in order to be released from her service."

A woman of the name of Brampton, who was also present at the time of the confession, was then called as a witness, who said that Gilby told the prisoner in the presence of her mistress and her husband, and before she had made any confession, "that it would be better for her to tell the truth." Gilby was then recalled; and upon being questioned said, "I could not positively swear that I did not tell the prisoner that it would be better for her to tell the truth. I do not recollect that I did. I cannot say positively what was the first thing I said to her. I believe I asked her what she had put in the milk. It is very likely that I might tell her it would be better for her to tell the

The words, "It would be better for you to tell the truth," addressed to a girl thirteen years of age, by a medical man attending upon a person whom the girl is suspected of having poisoned, are sufficient to exclude evidence of a confession by the girl consequent upon the use of them.

Where evidence of a confession was received, which, upon further examination, it appeared should have been excluded; but which was nevertheless submitted to the jury on the ground that they could not divest their minds of the effects produced by the admission; and the prisoner was convicted;—such conviction was reversed.

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truth. Smith and his wife were both present and heard what I said." Smith, who was examined as a witness, could not recollect what was said. Upon this,

Flowers, for the prisoner, submitted that the prisoner's confession ought to be struck out of the learned Judge's notes, and not submitted to the jury. In support of this he cited *Rex v. Spencer (a)*, *Reg. v. Taylor (b)*, and *Reg. v. Laughner (c)*.

PATTESON, J., after consulting with DENMAN, C. J., declined to strike the evidence of her confession off his notes, and left the whole case to the jury, on the ground that it was impossible that the jury, after they had heard the confession, could entirely divest their minds of it. The deposition of the mistress was then read, in which appeared an account of the conversation between Gilby and the prisoner, without any mention of any threat or promise (*d*). Inde-

(*a*) 7 C. & P. 776.

(*b*) 8 C. & P. 733.

(*c*) 2 C. & K. 225.

(*d*) The mistress, who was suffering from dropsy, was incapable of being removed to give evidence. Her deposition had therefore been taken by a magistrate in the presence of the prisoner. By 1 & 2 P. & M. c. 14, s. 4, "In all cases of felony and manslaughter two justices (one of the quorum) before whom any prisoners shall be brought, shall, before any bail or mainprize, take the examination of prisoners, and the information of them that bring them, and certify the examination with the bailment at the next general gaol delivery to be holden within the limits of their commission." By 2 & 3 P. & M. c. 10, s. 2, "Any justice before whom any persons shall be brought for manslaughter, or felony, or for suspicion thereof, before he or they shall commit or send such prisoner to ward, shall take the examination of such prisoner, and information of them that bring him, of the fact and circumstances thereof, and the same or as much thereof as shall be material to prove the felony, and shall put in writing within two days after the said examination, and shall certify," as directed by the 1 & 2 P. & M. c. 14, s. 4. By the 7 Geo. IV. c. 64, s. 2, "Two justices of the peace, before they shall admit to bail, and the justice or justices, before he or they shall commit to prison, any person arrested for felony, or on suspicion thereof, shall take the examination of such person, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same or as much thereof as shall be material into writing, and the two justices shall certify such bailment in writing, and such justice or justices shall submit all such examinations, informations, &c., and deliver and cause the same to be delivered to the proper officer of the Court in which the trial is to be, before or

pendent of the confession, the evidence did not warrant a conviction.

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The jury found the prisoner *guilty*, and the learned Judge reserved for the opinion of the Judges, whether he was right in admitting the evidence, and leaving it to the jury.

Flowers, for the prisoner, submitted that the evidence of the confession ought not to have gone to the jury. The words of Gilby were an inducement to the prisoner to make

at the opening of the Court." By sect. 3, the same provision is made where any person is charged before a justice with a misdemeanour. These statutes do not in express terms make the depositions admissible in evidence against a prisoner. It has, however, been usual to receive them in evidence where the person who made the depositions is dead, or insane, or purposely kept out of the way; but it has been doubted whether they could be read when the party was from illness unable to travel (see Chit. Arch. 9th ed. 133). In numerous cases, also, which might be adduced, the statutes were insufficient for the proper administration of justice. It was, therefore, thought necessary to enact, by 11 & 12 Vict. c. 42, s. 17, that "in all cases where any person shall appear or be brought before any justice or justices of the peace, charged with any indictable offence, whether committed in England, or Wales, or upon the high sea, or on land beyond the sea; or whether such person appear voluntarily upon summons, or have been apprehended with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing; and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same: and the justice or justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do. And if, upon the trial of the person so accused as first aforesaid, it shall be proved, by the oath or affirmation of any credible witness, that any person, whose deposition shall have been taken as aforesaid, is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he, or his counsel, or attorney had a full opportunity of cross-examining the witness, then if such deposition purport to be signed by the justice, by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not, in fact, signed by the justice purporting to sign the same." See also, s. 18, Form of Caution to be used by Justices.

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the confession. *Reg. v. Laughner* was expressly in point ; there the words used were, "Tell the truth," and the evidence was excluded. The present case is much stronger. Here the words are, "It will be better for you to speak the truth."

MAULE, J.—I have heard similar words used five hundred times, and the evidence in such cases has always been excluded.

ERLE, J.—It has been held by some judges that the mere words "You had better tell the truth," do not necessarily amount to such an inducement or exhortation as to exclude the evidence of a confession. I am of opinion the words are only an exhortation to speak the truth. It is, however, in every case a question entirely for the judge before whom the trial takes place, whether the words do or do not amount to an inducement.

POLLOCK, C. B.—I collect from my Brother Patteson, that he would have excluded the evidence, if Gilby had admitted in the first instance that it was likely he had made use of the words imputed to him.

PATTESON, J.—I must observe, that had Mr. Gilby so stated in the first instance, I should not have received the evidence. But the use of any words amounting to an inducement not being in evidence at the time, evidence of the confession was properly received. Afterwards, when Mr. Gilby was recalled, he said, "Very likely he might have said so," and the words were affirmatively proved by another witness. The question therefore is, whether I ought to have treated the evidence in the same way as if the witness had so said originally, and the evidence of the confession had never been admitted. There is no doubt but in that case the prisoner would have had an acquittal, because there was no other evidence for a conviction.

POLLOCK, C. B.—We are all of opinion that the conviction cannot be sustained.

Conviction reversed.

SITTINGS AFTER MICHAELMAS TERM,

IN

THE TWELFTH YEAR OF THE REIGN OF VICTORIA.

CORAM

POLLOCK, C. B.,

PATTESON, J.,

PARKE, B.,

CRESSWELL, J.,

WILLIAMS, J.

IN THE EXCHEQUER CHAMBER.

REG. v. JOHN DISTIN STEAR.

1848.

LARCENY.

*Saturday,
Dec. 9.*

“JOHN DISTIN STEAR was tried at the last Michaelmas Quarter Sessions for the borough of Plymouth, on an indictment charging him with stealing a mare, the property of James Pugsley, and found guilty, the judgment being respited subject to the following case.

“It appeared in evidence that the prosecutor, who lived in Jersey, had, in March, 1848, delivered a horse and the mare in question to the keeping of the prisoner, who was a farmer and horse-dealer, living at Loddeswell, 16 miles from Plymouth, with orders to do his best to sell them. Accordingly, in May, 1848, the prisoner sold the horse. On the 27th June, 1848, the prosecutor, who was himself examined as a witness, went to Loddeswell with Richard Gee (who was also examined as a witness) and stated to the prisoner that he came for the express purpose of taking the mare away, and that he wanted his bill. The prisoner answered that he had no bill to give him, that all was paid with the money he, the prisoner, had received from the prosecutor, and out of the money that he, the prisoner, had

The prosecutor sent a mare to the prisoner for sale, and after some time made two several applications to have her returned. The prisoner promised to ride the mare to Plymouth for the prosecutor; he did so, and put the mare up at a stable, and paid for her bait. Whilst the mare was there, the prosecutor refused to let the prisoner take the mare to a place he desired to send her to, and sent a boy, who went, with orders to the ostler at the stable not to let the prisoner

have the mare again. The prosecutor then told the prisoner “never to put finger near the mare again,” to which the prisoner answered, “Well.” The prisoner afterwards applied to the ostler for the mare, and obtained her by means of a false statement. Held, that the prisoner was rightly convicted of larceny.

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got for the sale of the horse ; that he had sold the horse for 17 sovereigns, and that after all was paid he had 14 sovereigns to hand over to the prosecutor ; he added, that the mare had received temporary injury from a fall, and it appearing on examination that such was the case, the prosecutor consented that she should remain with the prisoner a few days longer. The next day (the 28th June) the prosecutor, in consequence of some information received in the interval, went again with his brother-in-law, Thomas Steer (who was also examined as a witness) to the house of the prisoner, who was at that time absent ; whereupon the prosecutor left Thomas Steer there with orders on the return of the prisoner to demand the mare and the money. Upon the prisoner's return on the 29th, Thomas Steer made this demand accordingly, when the prisoner refused to give up the mare or the money to him, but said that he would go and see the prosecutor himself at Plymouth, and thereupon the prisoner rode the mare, and Thomas Steer rode in company with him to Plymouth the same day. At Plymouth the prisoner, in Thomas Steer's presence, placed the mare at Port's Livery Stables, and they both then went to seek the prosecutor. On finding him, Thomas Steer stated in the prisoner's presence that he the prisoner had stated that he would not deliver to him the mare or the money, but that he would go himself to Plymouth. The prosecutor upon this told the prisoner that he need not have done so, as he, the prosecutor, had given full power in the matter to Thomas Steer the day before ; Thomas Steer then said the mare is at Port's : after this they dined together, and then the prisoner paid the prosecutor 13*l.*, saying that he kept back 1*l.* for vetches had since the mare's illness, and that this was all that was due.

“ The prosecutor then told Thomas Steer to take the mare and ride her to Mr. Elliot's, at Babland, who was going to keep, and eventually buy her. Upon this the pri-

soner said, "Why not let me take the mare back to Mr. Elliot's myself, its all in my way?" to which the prosecutor answered, "I dare you ever to put finger near that mare again. Thomas shall ride her to Mr. Elliot's, and you may ride Thomas's horse home if you please." The prisoner then left. Just after this, the prosecutor sent his nephew George with orders, according to which, George went to the stable at Port's where the mare was, and ordered the ostler not to let the prisoner have the mare, as it was his uncle's. The prosecutor, in the mean time, set out to go on board the steamer for Jersey. On his way to the Quay the prisoner joined him, and again twice asked him to be allowed to take the mare to Mr. Elliot's himself, and was again twice ordered by the prosecutor in the presence of Thomas Steer, who accompanied them, never to put finger near the mare more, to which he answered, 'Well.' The prisoner then said, 'I am short,' to which the prosecutor answered, 'I wont see you short for a crown-piece to go home with,' and gave him 5s. The prisoner then left. Thomas Steer went on with the prosecutor and saw him on board the steamer for Jersey. In the meanwhile, the prisoner on leaving the prosecutor met a man called Elmsley, who had been in company with the prisoner and the prosecutor in the course of the afternoon. On so meeting Elmsley, he told him that the prosecutor and himself had made it all right, and that the prosecutor had given him 5s. Elmsley, who was examined as a witness at the trial, then went with the prisoner, about five o'clock, P.M., to Port's stables. The ostler then told the prisoner that a boy had been there to say that he, the ostler, was not to give up the mare to him, the prisoner, for she was his uncle's. To this, the prisoner answered, 'I have just left the party, it is all right now,' and ordered out the mare; upon which the ostler brought out the mare, and gave her to the prisoner. The prisoner then

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paid for the mare's bait, and said, 'If any one comes to inquire for me, say I am gone into the country, a mile, to see a pony, and shall be back in an hour.' Elmsley then said, 'If I am to go to the Town's-end, I will ride the mare.' The prisoner then handed the mare to Elmsley, who mounted, and rode her through the streets, the prisoner following close by his side. When they arrived at the Modbury-inn, on the outskirt of the town, Elmsley dismounted, and they stopped and drank. The prisoner then said, 'I am off home,' got up, and rode the mare away. The prisoner never returned to Port's; and neither the ostler, nor Elmsley, saw him again until he was in custody. On his road home to Loddswell, on his being asked by Richard Gee, aforesaid, whom he had accidentally met, 'How's this, that you have got the mare back?' The prisoner answered, 'I have seen Mr. Pugsley, and settled to take her back again.' Thomas Steer, after seeing the prosecutor on board the steamer for Jersey, went to Port's and found the mare gone. On further inquiry, he subsequently (on the 7th of July) went to the prisoner's house and demanded the mare, when the prisoner said, that he had sold her; upon which a warrant was applied for, and the prisoner apprehended. It appeared further, in evidence, that prisoner's brother, William, had sold the mare, as early as the 3rd of July, to a Mr. Bickford, with the prisoner's assent, the prisoner stating to Mr. Bickford, that he himself had previously sold the mare to his own brother. During the whole of these proceedings, as it appeared in evidence, the prisoner never set up any claim to her for the keep or for attendance on the mare, neither did he even allege that he had any pecuniary demand of any sort against the prosecutor, until he appeared in custody before the magistrates. At the trial no evidence was tendered on the part of the prosecutor of any such debt or demand. At the close of the case for the prosecution, it was contended for the prisoner,

on the authority of *Rex v. Smith* (a), and *Rex v. Banks* (b), that there was no case of felony to go to the jury. I, however, was of opinion, that the present case was distinguishable from the cases cited; and that, although there was clearly no felonious intention on the part of the prisoner at the time when he first got possession of the mare, by virtue of the original bailment in March, still, as that bailment was determined before the prisoner took the mare away from Port's, that it was for the jury to say, regard being had to all the circumstances of the case, with what intention the prisoner so took the mare away on the 29th June. The jury having found the prisoner "Guilty," the judgment was respited, the prisoner being in the mean time liberated on recognizances. The opinion of the Judges, therefore, is now respectfully requested as to whether the prisoner was rightly convicted.

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" W. C. ROWE,

" Dec. 1, 1848.

" Recorder of Plymouth."

Greenwood, for the prisoner, submitted that, upon the facts stated, this was no felony. The prisoner, who took the mare to the stable, delivered her to the ostler, paid for the bait, and the mare was, by the ostler, re-delivered to the prisoner; and, therefore, no change of property ever took place, nor could any change of property ever take place without a re-delivery in law to the prisoner, of which there was no sufficient evidence. In March, 1848, the horse and mare were delivered to the prisoner to sell. The horse was sold by him, and, after several attempts to sell the mare, a question arose between the parties as to taking her back from the prisoner. The prisoner afterwards rode the mare to the stables at Plymouth, and there met with the prosecutor, who said to him, " I dare you ever to put your finger upon the

(a) 1 Moo. C. C. 473.

(b) Russ. & Ry. 441.

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mare again ;” and sent a person to the stable to tell the ostler not to deliver the mare to any other person than himself. This did not divest the prisoner of the possession of the property ; he therefore still continued to deal with the mare, for the purpose of sale in order to secure his commission. This could not be said to be a felony. But, even allowing that the time of the bailment was at an end, if the possession still remained in the prisoner no felony was committed. [*Pollock*, C. B.—But can you make that out? Here the offence charged against the prisoner is taking a horse away from a certain person. If the property was never out of the possession of the prisoner, there clearly was no taking, and if so, there was no felony. This appears to me entirely a question of fact (*a*).] The objection here appeared upon the statement of the case. The question left to the jury was the intention with which the prisoner took the mare away from Port’s stables ; this he apprehended was not the criterion. If goods have been delivered to a person for the purpose of selling them within a week, and he sells them after the week, even *animo furandi*, it is not a stealing. *Reg. v. Goodbody* (*b*). There is a distinction between the determination of the bailment and the determination of the possession. [*Parke*, B.—If goods are delivered to a person to carry, and he break the package, the bailment is determined. When a man rides a horse further than he has a right to do, it does not constitute a felony ; but here there is a positive determination by the party. *Cresswell*, J.—What do you say to the case of a person who rides a horse in a fair, and returns and declines to give the price demanded, and is told to dismount, and then rides away : is not that a felony? *Parke*, B.—The cases certainly go to show that when a

(*a*) His lordship further observed, “ It is very inconvenient to send a long statement of facts to us to draw a conclusion, and I hope such a practice will not prevail.”

(*b*) 8 C. & P. 665.

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party holds over after the determination of the bailment, he is not guilty of larceny. In such case he is merely a holder by wrong ; but it is otherwise where there is a positive order to give up the property. [*Williams, J.*—I take it the distinction is, whether *trespass de bonis asportatis* or *trover* would be the proper form of action. If the former, an indictment might perhaps be sustained ; but not so if the latter. *Pollock, C. B.*—The question is, whether there was evidence to go to the jury that the custody or possession of Port was the possession of the owner after certain circumstances which took place. *Patteson, J.*—Whether Port was made the agent of the prosecutor by what took place between the parties.] What appears is simply that a message was sent to the ostler, which he disregarded ; that being so, the question is, whether the possession of the prisoner had ever terminated. It would have been different if anything which could be construed to determine that possession had taken place in the presence of Port, to which Port had assented, and, as it were, attorned to the prosecutor. If the mare had remained at the prisoner's own stable, and the prosecutor had made the same observation, would it have put an end to the possession ? It might have put an end to the bailment ; it might have determined the special purpose for which the mare was delivered, and although the contract might have been at an end, the possession might still have remained ; but upon that the opinion of the jury was not taken ; it was simply left to them to say, with what intention the prisoner took the mare away from Port's stables. The Recorder stated it as his opinion, that the case turned entirely upon that point. The prisoner took the mare away to his own farm, sold her, and accounted for the proceeds. The case therefore entirely turns upon the question whether a change of possession took place during the time that the mare was at Port's, and this question was in no way submitted to the consideration

1848. of the jury. [*Cresswell*, J.—There was a demand of
 REG. v. STEAR. the mare the day before, when the prisoner said he
 would himself take the mare to Plymouth; he did so,
 and when at Plymouth the prosecutor ordered another
 person to take the mare away, upon which the prisoner
 said, “Why not let me take her?” thereby assenting
 to the possession in the prosecutor. The same request
 he made a second time, when he was told “never to put
 finger upon the mare more;” to which he answered,
 “Well.” The prisoner then went to the ostler, who com-
 municated to him the notice he had received, and who
 acted upon that notice. After that the prisoner took
 the mare away under a pretence that he should return
 in an hour: how can you make that anything else but a
 felony?] It may be that he could not have obtained the
 mare again without telling a falsehood; but if the acts of
 the parties did not alter the possession of the property, the
 falsehood was altogether immaterial to the question in issue.
Reg. v. Harvey (a) is very distinguishable from this case;
 there the prisoner never had any right to sell at all.
 [*Parke*, B.—I think the distinction is rightly put by my
 Brother Williams, that in order to support an indictment
 for larceny the circumstances must be such as would main-
 tain an action of trespass.] In *Reg. v. Smith* (b), where
 the prisoner received a horse to be agisted, and after a short
 time sold it, it was held not to be a larceny. [*Parke*, B.
 —That was a case of bailment.] It then comes to this:
 is there a substantial distinction between a determination
 by a countermand of authority at a certain time, or of
 coming to a determination by the terms of the original
 agreement? If a horse was given to a person for a week to
 sell, and he sold it after the week, would that be a felony?
 If not, it is difficult to say how this could be considered a
 felony either; there is no distinction between the possession

(a) 9 C. & P. 353, 1 M. C. C. 703.

(b) 1 M. C. C. 473.

of the mare by the prisoner at his own stable or at Port's stable. The only important question really was, whether a change of possession took place at Port's stable; it was a question of fact, upon which the jury had given no opinion whatever, and unless the facts did show an undoubted change of possession, the Court would say that this conviction could not be supported.

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POLLOCK, C. B.—If any point at all is submitted to us, it appears to be this;—whether there was any evidence to go to the jury that Port became the real bailee after the delivery at his stables by the prisoner. I can discover no other point. If that is the question, I think there was evidence from which the jury may have come to the conclusion that the possession was at an end; and the conviction therefore is right.

PARKE, B.—In order to constitute a larceny, the act must be of such a character that an action of trespass would lie for it. Supposing it to be the case that the mare was taken to Port's stable as the prisoner's mare; I think there is sufficient to show that the bailment was determined by the consent of the parties; that being so, it is as if the mare was originally brought to Port's stable by the prosecutor, and the prisoner had come with a false story, and by that means obtained possession of her.

PATTERSON, J.—I think this, as I before observed, simply a question whether Port became the agent of the prosecutor. This was involved in the question left to the jury. Although not put into Port's possession for the use of the prosecutor at the time, it was afterwards ordered that the prisoner was not to have the mare again. Nevertheless, after the prosecutor has left, the prisoner again takes her away. The whole conduct of the prisoner shows that at the time he could have nothing to do with her.

CRESSWELL and WILLIAMS, JJ. concurred.

Conviction affirmed.

1848.

*Saturday,
Dec. 9.*

A special verdict, "Not guilty of stealing the watch, but guilty of keeping possession of it, in the hope of reward, from the time he first had the watch," is an acquittal, upon a charge of larceny.

THE QUEEN v. GEORGE YORK.

LARCENY.

"AT the General Quarter Sessions for the peace for the county of Northampton, held at Northampton, on Wednesday the 18th day of October, 1848, before the Most Hon. Spencer Joshua Alwyne, Marquis of the county of Northampton, Henry Barne Sawbridge, Esq., the Right Hon. Robert Vernon Smith, the Hon. Philip Sydney Pierrepont, Sir Robert Henry Gunning, Bart., and others their fellows, Justices of our said lady the Queen, assigned to keep the peace in and for the said county of Northampton; George York, then late of the parish of Boughton in the said county, labourer, was arraigned upon a certain indictment which, in the first count, charged him, the said George York, with feloniously stealing at Boughton aforesaid, on the 27th day of June in the twelfth year of her present Majesty's reign, one silver watch of the value of 5*l.*, of Joseph Warren; and in the second count, with receiving the said watch well knowing the same to have been feloniously stolen. The prisoner pleaded Not guilty to the said indictment, and was put upon his trial for the same. The evidence against the prisoner seemed to prove that he had found the watch, and had subsequently appropriated it to his own use, and the question thereupon, submitted by the counsel for the prosecution to the Court and jury was, that if at the time the prisoner found the watch, he took possession of it with a view of stealing it, or if he found the watch and intended to detain and keep it until a reward was paid for the same, then the prisoner had committed a larceny. The jury, after hearing counsel on behalf of the prisoner, retired to consider their verdict, and upon their return into court delivered a special verdict, in

writing, of which the following is a copy; the words scored under having been subsequently added by the jury after explanation by the Court with the jury:—‘Not guilty of stealing the watch, but guilty of keeping possession of it in the hope of reward *from the time he first had the watch.*’

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REG. v. YORK.

“The second count was abandoned by the counsel for the prosecution, and the jury found the prisoner on that count ‘Not guilty.’ The counsel for the prisoner then moved the Court that the prisoner should be forthwith discharged, the special verdict being one which amounted in law to a verdict of acquittal. The Court after hearing the argument of the prisoner’s counsel, and also the counsel of the prosecution in reply thereto, decided that the verdict amounted to a verdict of Guilty, and the following entry was made upon the record, “Guilty; judgment to be reserved until the next sessions; in the mean time a case to be submitted to the Judges. The prisoner to be admitted to bail himself in 100*l.*, and one surety in 50*l.*, conditioned for the appearance of the said George York at the next sessions, and abide the judgment of the Court.”

Flood, for the prisoner, having stated the facts as they appear in the case, the Court called upon

Macaulay, on behalf of the Crown. It was the prisoner’s suggestion that he had found the watch, and there was no other evidence that it had been lost. The trial throughout proceeded upon the assumption that the watch had been found by the prisoner. [*Parke*, B.—If he found it, how could he be guilty of larceny?] The prisoner having kept the watch from the first for the purpose, not of restoring it to the owner without any reward, but of turning it to his own profit, and this being specially found by the jury, the Court, under the circumstances, considered it to amount to a verdict of Guilty; it appears to have been the opinion of the jury that he had adopted a number of ingenious tricks

1848. in order to get possession of it in the first instance.
REG. v. YORK. He cited *Reg. v. Peters (a)* ; *Reg. v. Mole (b)*.

POLLOCK, C. B.—The verdict in this case clearly amounted to “Not guilty.”

PARKE, B.—It is perfectly clear he was not guilty of the offence of larceny.

PATTESON, CRESSWELL, and WILLIAMS, JJ. concurred.

Conviction reversed.

(a) 1 C. & K. 245.

(b) 1 C. & K. 417.

See Arch. C. L. 185, 9th ed.

THE QUEEN v. JAMES WEBB.

1848.

INDECENT EXPOSURE.

THE prisoner was indicted at the Middlesex Sessions for a nuisance. The following is the form of the indictment:—
The jurors for our lady the Queen, upon their oath, present that James Webb, late of the parish of St. Margaret, Westminster, in the county of Middlesex, labourer, on the 2nd day of October, in the twelfth year of the reign of our Sovereign lady Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, with force and arms, at the parish aforesaid, in the county aforesaid (a), a certain common public place, within a certain victualling and ale house there situate, unlawfully, wilfully, publicly, and indecently did expose and exhibit his private parts, naked and uncovered, in the presence of Mary Ann, the wife of Edward Cherrill, and divers other the liege subjects of our lady the Queen, then and there being for the space of divers, to wit, ten minutes, to the great damage and common nuisance of the said Mary Ann Cherrill and divers other the liege subjects," &c.

"At the trial, it was proved by the prosecutrix that she was taking care of a public-house, and standing behind the bar, through which there was a public passage from the entrance-door of the public-house to the bar-parlour; that he conducted himself in an offensive manner, but not amounting to an indecent exposure, and, whilst so doing, several persons passed to and fro; that he then took out and exposed his private parts to her, and thereupon she directly ran off and told her husband; that there was no one in sight but herself at the time when she saw his private parts exposed."

(a) *Sic.*

Saturday,
Dec. 9.

An indecent exposure to one person is not an offence indictable at common law.

Semble, aliter, when it is so done that other persons might have seen.

Upon a case reserved, where the indictment is included in the statement of the case, the Court may look at the indictment, and, if bad, reverse the judgment.

Semble, In an indictment for an indecent exposure, it is sufficient to allege that

A. B. "unlawfully, wilfully, publicly, and indecently did expose and exhibit," &c.

"in the presence of" C.

D. "and divers other liege subjects," &c.

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“Two points were made :—

“First, that an indecent exposure in the bar of a public-house is not an indictable offence.

“Secondly, assuming the place sufficient, there must be more than one person present at the time of the exposure, or the offence is not completed.

“The jury, under the direction of the Court, found the prisoner Guilty, subject to the opinion of the Judges.”

Clarkson, for the prisoner, submitted that the indictment did not disclose any offence in law. [*Parke*, B.—That is not reserved for us.] No, but the objection was made at the trial. [*Parke*, B.—Then upon that you must bring your writ of error.] In order to make the offence complete, it is necessary that the exposure should be in an open and public place, or to the people; and that the exposure of a man to a woman is no offence, unless done for the purpose of insulting her; and then it is an offence provided for by the Vagrant Act (*a*). Here the evidence does not disclose that others were present. This could be no offence, unless the Court was prepared to say that a man relieving himself in the street, when no person might be present, was guilty of an offence. In *East*, P. C. p. 3, after treating of other indictable offences, the author proceeds to that of open immorality, and observes, “Similar to these are all scandalous and open breaches of morality exhibited in the face of the people,” and instances *Sedley’s* case (*b*), which

(*a*) By 5 Geo. IV. c. 83, s. 4, any justice of the peace has power to commit for not exceeding three months with hard labour, any person who shall wilfully, openly, lewdly, and obscenely expose his person, in any street, road, or public highway, or in view thereof, or in any place of public resort with intent to insult any female.

(*b*) 1 Sid. 168. The defendant was indicted—that he did expose his naked body in a balcony, in Covent Garden, to a great multitude of people, and there did such things, and spoke such words (disclosing the particulars), and the indictment being openly read to him in court, the justices told him, that although there was then no Star Chamber, they would, nevertheless, let him know that this Court [the King’s Bench] was the *Custus Morum* of all the

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was an exposure of the person from a balcony in Covent-garden Market. This case is also referred to in 1 Hawk. c. 26, s. 4, where, in speaking of that which is an offence, it describes it under the words, "All open lewdness, grossly scandalous." With the exception of *Reg. v. Watson*, to which he would immediately refer, there were only two cases in point to be found in the books; the one just cited, and the other the case of *Reg. v. Crunden* (a): there the offence consisted in the exposure of a person who went to bathe in the front of some newly-erected houses, where persons, before the erection of the houses, had been in the habit of bathing (b). [*Parke, B.*, mentioned the case of *Reg. v. Reubegard* (c), a French master, and tried before him at York, where the evidence in support of the case was, that he had exposed his person from the window of his apartment to a woman residing opposite; but there was no evidence that he had been seen by any other person. In which case his Lordship stated he was of opinion that an exposure to the woman only was not sufficient, and left it to the jury to say, whether the transaction could be seen by

King's subjects, and that it was high time to punish such profane actions perpetrated against all modesty, &c. The defendant confessed the indictment, and was sentenced to pay a fine of 2000 marks, be imprisoned one week, without bail, and to give security for his good behaviour for three years. (1 Keb. 620, S. C.) It appears, from observations made by the Court, in *Reg. v. Read*, 1 Fort. 98, and also in *Rex v. Curl*, Stra. 788, that Sedley also committed divers assaults upon the people.

(a) 2 Camp. 89.

(b) M'Donald, C. B., in giving judgment, observed, "I can entertain no doubt, that the defendant by exposing his naked person on the occasion alluded to was guilty of a misdemeanour. The law will not tolerate such an exhibition. Whatever his intention might be, the necessary tendency of his conduct was to outrage decency, and to corrupt the public morals. Nor is it any justification that bathing at this spot might, a few years ago, be innocent. For anything that I know a man might, a few years ago, have harmlessly danced naked in the fields beyond Montague House, but it will scarcely be said, that any one might now do so with impunity in Russell Square. Whatever place becomes the habitation of civilized man, there the laws of decency must be enforced."

(c) Not reported.

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persons in the public street, and if so, that it was a nuisance, and they would return a verdict of Guilty under his direction. The jury found him Guilty, and his Lordship passed sentence accordingly.] A person might be so circumstanced as to be unable to avoid subjecting himself to an indictment, if this indictment was to be upheld. In Chit. Burn's Jus. p. 615, under "Lewdness," it is said, "So in general all *open* lewdness, grossly scandalous, is punishable at common law," the word "*open*" being printed in italics: and again, it says, "An indecent exposure of the person to public view is an indictable offence at common law." In every case the offence spoken of as indictable is an *open* and *public* exposure. In Stephen's Commentaries (a), lewdness is stated to be an indictable offence, "where of an open and notorious character." [Pollock, C. B.—We are all agreed that we may look at the indictment, and if bad we are bound to reverse the judgment; and if we can confine a case of this sort to a question of pleading, it is much better to do so. Cresswell, J.—The words of the indictment are, that he did wilfully expose and exhibit.] That might have been done in the dark. [Cresswell, J.—What is meant by the word *exhibit*?] It is derived from *exhabeo*, and simply means to have out. There is nothing inconsistent with the words of the indictment, that the prisoner may have had his back turned towards the prosecutrix. [Cresswell, J.—If by the word *exhibit* is meant, to show; he is charged to have shown himself to the public.] The indictment does not allege that it was an exposure *to*, but simply that it was an exposure *in the presence of* —; the person might have been blind. The case of *Reg. v. Watson* (b) has, in fact, decided this question; and the observation there made by the learned Judge is

(a) Vol. iv. p. 302.

(b) 2 Cox, C. C. 376. In *Reg. v. Watson*, the indictment contained two counts. The first charged the defendant in the common form, with an expo-

particularly favourable to the prisoner's case ; he observes " The general rule is, that a nuisance must be public ; that is, to the injury or offence of several. There is no precedent of such an indictment as the present, and we are not inclined to make one." All that can be made of the present case is, that he exposed himself to one person in a public and open place, if a passage in a public-house is to be deemed a public and open place ; if not, then this is certainly no offence indictable at common law.

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Prendergast contra.—This indictment disclosed an indictable offence ; and the evidence was sufficient to convict the prisoner of the misdemeanour as charged. The indictment charged that in a certain public-house, "within a certain victualling and ale house there situate," that is to say, in a public place in a public inn, a place where every man has a right to go, and not a private part of the inn, he did expose and exhibit his person ; and such an indecent exposure of his person in such a place is an interference with the rights of the public. [*Pollock*, C. B.—The word "indecent" has not much meaning in an Act of Parliament.] The word in itself certainly would not have been sufficient, but here it is connected with the other words—expose and exhibit his person. To expose may mean, simply to lay bare, but the word exhibit means something more ; it means an intention that other persons should see the parts so laid bare. The exhibition is also stated to have been public. In *Reg v. Crunden*, the party was innocently bathing, and because he might have been seen, he was guilty of the offence: for the law intends that a man means that which is the natural consequence of his own act. The case of *Reg. v. Watson* was misconceived in form, and differs al-

sure of his person in Paddington Church-yard, in the sight and in the view of one L. C., in the said public place. The second count alleged the offence to have been in the sight of divers other persons. The defendant was found guilty on the first count, and on the second not guilty. Judgment was arrested.

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together from the present. The charge there was, that he “did expose his person to L. P., to the injury and corruption of the morals of the said L. P.” That is no offence at all. That which shocks the morals alone is not indictable, but that which shocks public decency, and in any way deprives the public of the free exercise of those rights to which they are intitled, is indictable. It is no indictable offence to corrupt the morals of a particular woman, that is no public offence ; but this is clearly an invasion of the public rights, and is stated to be done to the nuisance of the public. [*Parke, B.*—Not so ; to the nuisance of “divers” may mean two or three. A matter is indictable as a nuisance because it may be a nuisance to all the Queen’s subjects. *Williams, J.*—An indictment against a common scold concludes “to the nuisance of divers the liege subjects.”] That is so, and supports the present case. Here the indictment clearly shows an infringement of the public rights. Suppose a person in Cheapside, or any other public street, to expose himself at the window of his house in broad day-light, and that only one person should be passing at the time and see him, there could be no doubt he would be liable to an indictment. [*Pollock, C. B.*—The ordinary form of indictment does not make it necessary that you should prove an actual view. It is—“in the presence of divers liege subjects, &c., and within sight and view of divers other liege subjects,” that would import that the parties were not blind. The offence could not take place in the presence of a number of patients in the Blind Asylum. *Patteson, J.*—The general form of the indictment is “did expose to the view of,” &c., why not follow the ordinary form ?] Archbold’s forms have not received any public approbation, nor are they to be considered as law (*a*). [*Pollock, C. B.*—In the statement of any offence in an indictment, the words used must be such

(*a*) Pollock, C. B., in answer to this observation, observed, “Generally speaking, Mr. Archbold’s publications are remarkable for their accuracy, and

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as to show clearly that the offence has been committed, and not words which by a fair and reasonable construction may not import any offence. "Within sight and view" imports that the parties might see, but this does not disclose that the parties were capable of seeing. The person may have taken particular pains that the act should not have been done within sight and view of any other person—he may have been assiduously careful not to offend any other person for anything that appears on the face of the indictment. I do not attach to the words expose and exhibit any precise legal meaning. It is consistent with this indictment, that even the woman herself may not have seen his person, although the act was done in her presence.] A person cannot be said to have exposed a thing in the presence of another who had never seen it. The meaning of the word is, that the prisoner did all that was necessary to enable the party to see.

Clarkson, in reply.—The case of an exposure at the window in a public street does not apply. The distinction being, that there, other parties might have seen. Here it was otherwise. The question really is, whether there was any opportunity for any other person to see. There is nothing upon the face of the case to show, that, either in the intention of the party or in the act done, any other person might have seen.

Pollock, C. B.—It appears to me that the conviction ought not to have taken place. It is not necessary to decide whether this indictment is sustainable or not, nor whether it is bad in arrest of judgment: though in passing I may say it would be better to follow the established precedents, and not adopt new forms. In *Reg. v. Watson* there were two counts, the first charging the offence as being in the sight of one person, the other as being in the sight of

I know no person who has contributed more to the profession, by his great diligence and learning."

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divers persons—and it was decided, there being actual proof but of one person being present, that there ought to have been an acquittal upon the second count. Upon the first, the judgment was arrested. In the present case it is shown that only one person was present; and therefore striking out of the indictment all that was not proved, it comes precisely within *Watson's* case, and according to that case the prisoner ought to have been acquitted.

PARKE, B.—The question is not now whether the indictment is bad or good. I am, however, disposed to think the words of the indictment, that he exposed and exhibited himself, to mean, in the sight of the party; and therefore I am disposed to think the indictment good; but if you strike out all that was not proved, it comes within *Watson's* case, and is therefore an exposure only to one person, and not an indictable offence.

PATTESON, J.—I adhere to *Watson's* case, and it therefore follows, that case being rightly decided, that the words “other persons” are material, and not being proved, the indictment fails. Strike out these words, and it is *Watson's* case over again. I am disposed to think it a good indictment.

CRESSWELL, J.—I should be very reluctant to say this was a bad indictment. The evidence, however, was not sufficient to support it.

WILLIAMS, J.—Strike out the words “not proved,” and it is precisely *Watson's* case, which I think good law.

Conviction reversed.

In *Reg. v. Read*, 1 Fort. 98, which was an action for printing a lascivious and obscene libel, but which was not directed against any particular person, Powell, J., observed: “There is no law to punish this offence; I wish there was, but we cannot make law; it, indeed, tends to the corruption of good manners, but that is not sufficient for us to punish it.” And he there also refers to *Lady Purbeck's* case, when the Star Chamber quashed the indictment

because it was for matters of bawdry. (See Pop. 208.) The case of *Reg. v. Read* appears, however, to have been overruled in *Rex v. Curl*, Stra. 788. See the judgment of Fortescue, J., in that case. To what extent, and in what cases, the Court of Queen's Bench may be the *custos morum* of all the King's subjects, and have the superintending of cases *contra bonos mores*, is, from the cases, very undefined; it may, however, be perhaps gathered from them, that no indictment will lie where the act is not publicly done, or so done in private that it might become public. See also *Rex v. Delaval*, 3 Burr. 1437; *Rex v. Gallard*, 1 Sess. Ca. 231; 4 Black. Com. 64.

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HILARY TERM,

IN

THE TWELFTH YEAR OF THE REIGN OF VICTORIA.

CORAM

LORD DENMAN, C. J.,
PARKE, B.,ALDERSON, B.,
COLERIDGE, J.,

COLTMAN, J.

THE QUEEN *v.* ROBERT WYNN.*Case reserved by the Honourable Baron Platt.*

1849.

Saturday,
Jan. 20.

In an indictment upon the stat. 7 Will. IV. & 1 Vict. c. 36, s. 26, against a person employed under the post office, for secreting letters, it is not necessary to set out the purpose for which he secreted them.

The act of secreting a letter by such a person, coupled with an intention to deprive the owner of the property, is a larceny.

Semble, Upon a case reserved, the Court will not entertain a question as to a matter of error upon the record—the Court not being constituted for that purpose.

SECRETING LETTERS.

“THE prisoner was tried before me, on the 23rd August last, at the Central Criminal Court, on an indictment charging him with stealing, whilst employed in the Post Office, two post letters, containing one half-crown, one sixpence, three postage stamps, and three sovereigns, the property of her Majesty’s Postmaster-General. He was employed in the Post Office, and his duty was to open the bags brought to the particular table at which he was placed, take out the letters, and separate them. The Scarborough bag, which contained, amongst others, the two letters described in the indictment, was brought to his table.

“He opened it, took out all the letters, and put them on the table before him. Twenty or thirty bags were opened on the same table, by the prisoner, at the same time; and the letter bills of the several bags were by him spread before him on the table. It then became his duty to separate the registered letters and unpaid letters from the unregistered paid letters, fold the registered letters in the bills, and place them in a drawer.

“In the course of the separation, he put two of the unregistered letters on one of the letter bills, and some of the registered letters in their respective bills in the drawer, from which he afterwards gave them to the Register Clerk

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to check the bills containing them. He afterwards put the rest of the registered letters in the drawer, and carried them, when collected, to the register clerk. When he had done so, he returned towards his table, and went to a water-closet. He was observed to hold in his hand what appeared to be a bill folded over letters—was followed, and after he had placed himself, with his breeches down, on the seat of the water-closet, was observed to put his hand between his legs. He was immediately taken into custody. On his coming from the water-closet, the two letters, sealed and unopened, laid on the paper contained in the pan.

“It appeared in evidence that if, through neglect, the letters were not accurately sorted, the person guilty of such neglect was liable to be punished.

“The Jury found that the prisoner, having committed a mistake in the sorting of the letters in question, secreted them in the water-closet, in order to avoid the supposed penalty attached to such mistake.

“Upon this verdict the judgment has been respited.

“The evidence adduced on the trial will be found in page 476 of the shorthand-writer’s notes for the Tenth Session, sent by the Corporation of London to the Judges.”

Ballantyne, for the prisoner. In the case reserved, no mention was made of the Act of Parliament under which the prisoner was indicted, nor was the attention of this Court sufficiently directed to the nature of the indictment. The statement of the case might lead to error in their Lordships’ minds, for from that it would appear that the prisoner was simply charged with stealing; whereas he was indicted under the 7 Will. IV., & 1 Vic. c. 36, s. 26 (a),

(a) 7 W. IV. & 1 Vict. c. 36, s. 26, Whereby it is enacted, “that every person employed under the Post Office, who shall steal, or who shall for any purpose whatever, embezzle, secrete, or destroy a post letter, shall, in England and Ireland, be guilty of felony, and in Scotland, of a high crime and offence; and shall, at the discretion of the court, be transported beyond the seas for the term of seven years, or be imprisoned for any term not exceeding three

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and the indictment contained two counts, which it was necessary to bring under the consideration of the Court. The one charging a stealing, and the other a secreting the letters. The finding of the Jury negatived a felonious intent; for they found that the prisoner, having made a mistake in assorting the letters, secreted them in the water-closet, in order to avoid the penalty; and the question was, whether such a verdict amounted to a verdict of Guilty. He submitted, first, whether this would amount to a stealing at common law; for, unless it did, the insertion of the word "secrete" in the statute would not assist the prosecution, for the secreting must be *ejusdem generis* with the stealing; therefore, if the act did not at common law amount to a stealing, the finding of the jury would not authorize a conviction for larceny. What constitutes a larceny has been fully settled in *Reg. v. Jones (a)*, and *Reg. v. Privett (b)*, in which cases all the authorities were fully brought before the Court; he, therefore, considered those cases as having settled the law upon the subject, and admitted that here there was a benefit to be derived by the party. But there was a palpable distinction between those cases and the present. In all the cases where it had been said that *lucri causâ* was not necessary, there had been a clear taking, a distinct separation from the owner of the goods alleged to have been stolen; here there was no original trespass committed, for the property came legally into the possession of the prisoner. If a servant, who had the charge of a library, were to take a book out of it, contrary to his master's orders, and to dirty that book or otherwise injure it, and then, in order to prevent his master's knowledge of the fact, and to shield himself from the

years and if any such post letter so stolen or embezzled, secreted or destroyed, shall contain therein any chattel, or money whatsoever, or any valuable security, every such offender shall be transported beyond the seas for life."

(a) 1 Den. C. C. 188.

(b) 1 Den. C. C. 193.

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consequences of his misconduct, were to destroy it, he would scarcely be held guilty of larceny. Here the party is not even found to have destroyed the property, but merely to have secreted it; so, if the servant had merely put the book out of the way, if he had merely secreted it, in order to prevent detection of the injury, it would clearly be no felony. Taking what is laid down in *Reg. v. Privett*, and *Reg. v. Jones*, as a definition of the requisites necessary to constitute larceny, it is submitted that the present case does not amount to that offence (a). [*Parke*, B.—How can any question be raised on the count for secreting? it is the very word made use of in the Act of Parliament.] The secreting must be *ejusdem generis*. [*Alderson*, B.—The statute relates to a secreting in any way whatever.] Still that secreting must be for an illegal purpose. [*Lord Denman*, C. J.—We must construe the Act of Parliament with reference to the offence against the Post Office authorities; with them the offence of secreting letters is very common.] It did not appear from the finding of the Jury that the prisoner ever intended to take the letters out of the entire dominion of the Post Office authorities. Nor did it appear that he secreted them for that purpose, or for the purpose of destruction. [*Alderson*, B.—Perhaps a better argument might be raised upon the 42 Geo. III. c. 81, s. 4 (b.)] The

(a) In *Reg. v. Privett*, it is said, that taking an article knowingly and against the will of the owner, and without colour or title of authority, with intent not to take temporary possession merely, and then abandon it (which would not be larceny), but to take the entire dominion over it, was larceny; and that it made no difference that the taking was not *lucri causâ*, or that the object of the prisoner was to apply the things stolen in a way which was against the wish of the master but might be beneficial to him; *Erle*, J., and *Platt*, B., *contra*, were of opinion, that it was not a larceny, as there was no intention to deprive the owner of his property in the goods,—others of the Judges would have doubted had this been *res integra*.

Platt, B. (who was present at the hearing of the principal case, by request of the court), observed, that *Reg. v. Privett* was not argued by counsel.

(b) By 42 Geo. III. c. 81, s. 4, it is enacted, "If any person or persons shall wilfully secrete, or detain, or, being required to deliver up by any deputy, clerk, agent, letter-carrier, post-boy, rider, driver, or guard, of any mail coach,

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words there are different from those in the 7 Will. IV. & 1 Vict.; the word *secrete* is there used, but it applies to a secreting with a view to a reward. [*Alderson*, B.—Is it not a gain to the person not to be detected?] Certainly, a benefit was to be derived, and therefore it must be admitted that it came within the principle of the decided cases. He, however, submitted that, notwithstanding the ordinary impression which would arise as to the prisoner's intention, from the fact of his having deposited the letters in the water-closet, the Court would not import anything more into the case than was found by the Jury, and therefore the Court could not say this was intended as a final disruption. Suppose it had been found that the prisoner had put the letters in a box, and locked them up? [*Parke*, B.—He might have done so in order to take care of them. *Coleridge*, J.—Supposing he had merely secreted the letters for an hour, would not that have been enough? The delivery of a letter being delayed for an hour may be a matter of very serious importance.] The secreting must be for some purpose or other within the meaning of the statute; and, in order to discover the meaning, it is necessary to look to the other words of the Act, and then it appears that it must be a secreting for the purpose of stealing or embezzling. [*Lord Denman*, C. J.—We have no doubt but that this is a secreting within the statute. *Alderson*, B.—That is perfectly clear, and I have a strong

or any other officer or person whatsoever employed or to be employed in any business relating to the Post Office, shall refuse or wilfully neglect to deliver up any mail or bag of letters sent or conveyed, or made up in order to be sent or conveyed by the post, or any letter or letters, packet or packets, sent or conveyed by the post, or put for that purpose into any Post Office, or house, or place for the receipt or delivery of letters or packets, sent or to be sent by the post, and which letter or letters, packet or packets, bag or mail, of letters, shall have been found, or picked up by the same, or any other person or persons, or shall by, or through accident or mistake, have been left with, or at the house of the same, or any other person or persons; each and every person and persons so offending shall be deemed and taken to be guilty of a misdemeanour, to be punished by fine and imprisonment."

impression that it is a stealing.] Still the finding would be bad upon this indictment, as it ought to state for what purpose the secreting took place. [*Lord Denman*, C. J.—For any purpose whatever.] But on the face of the indictment no purpose whatever is stated. [*Lord Denman*, C. J.—We do not know how that may be, we have not the indictment here (a.)] Where the words of an Act of Parliament are general, the charge in the indictment ought to be worded in as specific a form as possible, in order that the parties may fully know the nature of the charge, and prepare to meet it. [*Coleridge*, J.—If it is a matter of error upon the record, we cannot go into it; we are not a Court constituted for that purpose. *Parke*, B.—The question here is, whether the secreting is a larceny.] He submitted that it was not. In order to make this a larceny, the doctrine laid down in the cases cited must be extended, for in all those cases an absolute separation of the property had actually taken place; here there had been no separation. [*Coltman*, J.—You admit that if the jury had found he intended to destroy the letters, that would have been a felony. *Alderson*, B.—Here I take the finding to be, that the party took the letters, intending to make away with them.] He submitted that was not so, the Court could not import the intention to destroy, the Jury having merely found that he secreted the letters. The words secrete and destroy were both used in the statute; and, therefore, secreting and destroying were to be regarded as distinct offences.

Clarkson, for the Crown, was not called upon.

LORD DENMAN, C. J.—In the first place, as to whether this is a secreting within the statute. I have no doubt whatever that it is, although no purpose is stated. The Act of Parliament is clear, and applies to a certain class of

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(a) See *Reg. v. Webb*, ante, p. 26.

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persons filling offices of trust, and who, from their dealing with the Post Office letters, have at various times almost all the property of the country in their hands. They are not placed upon the same footing with ordinary parties who may be guilty of larceny. The statute was expressly passed for the protection and safety of property submitted to them ; and therefore they are not to secrete any letter for any purpose whatever. It was not, therefore, necessary to set out the purpose. The prosecutor might be ignorant of the purpose, and therefore any purpose was sufficient. This is in accordance with the decision of the Court of Queen's Bench in *Reg. v. Douglass (a)*, where the party, holding office in India, was charged under the statute *(b)* with receiving certain moneys as a gift and present, without stating to whose use ; the words of the statute being, " to the use of any person whatever." There it was held not to be necessary to state to whose use the money was received. So here the words of the statute being " every person employed under the Post Office who shall steal, or who shall, for any purpose whatever, embezzle, secrete, or destroy a post letter, shall be guilty of felony." It is not necessary to state for what purpose. That is a case precisely in point. The purpose in this case is altogether immaterial with respect to the larceny. Looking at all the circumstances, I am clearly of opinion that an act of larceny was committed. The Jury found that the man retired to a private place with the letter he had taken, and dropped it in such a way, that in all human probability it would have disappeared in a short time, and that for the purpose of avoiding a detection of his misconduct. We cannot help seeing that the Jury were of opinion that the letter was secreted in such a manner, that the owner would have been in a short time deprived of his property,—the object was

(a) 11 Jur. 925. 16. L. J. N S. M. C. 117, S. C. (b) 33 Geo. III. c.52. s. 62.

to avoid the penalty. I am of opinion the indictment is good without the statute; if there had been only the one count for stealing it would have been sufficient. The *asportavit* took place the instant he dropped the letters.

PARKE, ALDERSON, B B., COLERIDGE, COLTMAN, J J., concurred.

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As to the general application of the principle of *ejusdem generis*. In *Sandiman v. Breach*, 7 B. & C. 100, Lord Tenterden, C. J., in deciding upon the words of the statute 29 Car. II. c. 7, "no tradesman," &c., "or other person, or persons," &c., said, that where general words follow particular ones, *the rule* is to construe them as applicable to persons *ejusdem generis*, and that the statute, therefore, did not apply to the driver of a stage coach. In the *Archbishop of Canterbury's* case, 2 Rep. 46, b., it is said, that the general words of a statute beginning with inferior persons, as abbots, priors, &c., do not extend to superior persons, as bishops, &c. So where an Act of Edw. VI. enacted that all monasteries, colleges, &c., which should be dissolved, relinquished, forfeited, given up, &c., or *by any other means* come to the King, should be vested, &c., in the actual possession of the King; and the College of Maidstone subsequently came to the King by Act of Parliament, it was held not to be within the statute Edw. VI., for the words, *any other means*, were intended of any other inferior means, as dissolution, &c., and could not be extended to an Act of Parliament, which was the highest manner of conveyance that could be. (*Ib.*) It has, however, since been held that a *dissolution* by Act of Parliament is within that statute, and that the words, "*any other means*," include, as well a coming by Act of Parliament, as by any other way. See cases cited, *ib.* notes C. H. In an Act of Parliament, imposing duties on copper, brass, pewter, tin, *and all other metals not enumerated*, gold and silver are not included. *Casher v. Holmes*, 2 B. & Ad. 592.

It is clear, that in all statutes the general words must be governed by the preceding particular words; otherwise, the particular words would be entirely inoperative. But the difficulty is, after all, in deciding, whether the matter or thing sought to be introduced under the general words is of the same class or genus with the particular words used; and this must, in reality, depend upon the law of association of ideas. In Bac. Ab. "Statute" (I.) 6, citing Plowden, it is said, "In order to form a right judgment, whether a case be within the equity of a statute, it is a good way to suppose the law-maker present, and that you have asked him this question, Did you intend to comprehend this case? Then you must give yourself such an answer, as you imagine he, being an upright and reasonable man, would have given." See also Chit. Burn's J. "Statutes," s. 6; 1 Blk. Com. 87; Dyer, 109, pl. 38; *Reg. v. Neville*, 8 Q. B. 452; *Kitchen v. Shaw*, 6 Ad. & E. 729; *Reg. v. Shortridge*, 1 D. & L. 855; and see *Phillips v. Barber*, 5 B. & A. 164; *Attwood v. Mannings*, 7 B. & C. 278.

Whether general words in an Act of Parliament will extend to another Act of later date, see 2 Rep. 47 a, note L.; 1 a. Ab. "Statutes" (I.) 3.

1849.

*Saturday,
Jan. 20.*

In a tannery, certain skins had been dressed, the wages for dressing paid, and the skins deposited in a warehouse. The prisoner, afterwards, clandestinely removed those skins and carried them away, *'with intent to deliver them to the foreman, and get paid for them as if they were his own work.'* Held, not a larceny.

To constitute larceny there must be an intention, without any colour of right, to deprive the owner of the entire property.

Semble, the Court will not (except, perhaps, under extreme circumstances) send back a case for amendment under the 11 & 12 Vic. c. 78, s. 4.

The QUEEN v. WILLIAM HOLLOWAY.

LARCENY.

THE following case was stated for the consideration of the Judges by the Recorder of Liverpool.

“The prisoner, William Holloway, was indicted at the General Quarter Sessions, holden in and for the borough of Liverpool, on December 4th, 1848, for stealing within the jurisdiction of the Court 120 skins of leather, the property of Thomas Barton and another.

“Thomas Barton and another were tanners, and the prisoner was one of many workmen employed by them at the tannery in Liverpool to dress skins of leather. The skins, when dressed, were delivered to their foreman, and every workman was paid in proportion to and on account of the work done by himself. The skins of leather were afterwards stored in the warehouse of Thomas Barton and another adjoining to the workshop. The prisoner, by opening a window and removing an iron bar, got access clandestinely to the warehouse and carried away the skins of leather mentioned in the indictment, and which had been dressed by other workmen. The prisoner did not remove these skins from the tannery, but they were seen and recognized the following day at the porch or place where he usually worked in the workshop. It was proved to be a common practice at the tannery for one workman to lend work, that is to say, skins of leather dressed by him, to another workman, and for the borrower in such case to deliver the work to the foreman and get paid for it on his own account and as if it were his own work.

“A question of fact arose, as to the intention of the prisoner in taking the skins from the warehouse. The Jury found that the prisoner did not intend to remove the skins from the tannery and dispose of them elsewhere, but that

his intention in taking them was to deliver them to the foreman and to get paid for them as if they were his own work, and in this way he intended the skins to be restored to the possession of his masters.

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“The Jury, under the direction of the Court, found the prisoner Guilty ; and a point of law raised on behalf of the prisoner was reserved, and is now submitted for the consideration of the Justices of either bench and Barons of the Exchequer.

“The question is whether on the finding of the Jury the prisoner ought to have been convicted of larceny.

“Judgment was postponed, and the prisoner was liberated on bail taken for his appearance at the next or some subsequent Court of Quarter Sessions to receive judgment or some final order of the Court.

“GILBERT HENDERSON,
“Recorder of the borough of Liverpool.”

Lowndes, for the prosecution. [*Parke*, B.—This is like the case of *Rex v. Webb (a)*, where it was held that it was not larceny for miners employed to bring ore to the surface, (and who were paid by the owners according to the quantity produced,) to remove from the heaps of other miners, ore produced by them, and add it to their own, in order to increase their wages; the ore still remaining in the possession of the owners.] In that case there was no intention to injure the owner. [*Coleridge*, J.—But the effect was to make the owners pay more. *Parke*, B.—To take away the temporary use is no larceny. There must be an intention to take away the property. *Alderson*, B.—The taking of a young lady's hat, in order to induce her to go to a certain house, was held not to be larceny (*b*). So where the party took goods with an intention to restore the property, upon receiving a

(a) 1 Moody, C. C. 431.

(b) *Rex v. Dickinson*, R. & R. 420.

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reward (a). *Coleridge, J.*—If this were larceny, cases of mere trespass might be included.] In some cases, there might be a difficulty in distinguishing between what constitutes a larceny, and what is only a mere trespass. The distinction, however, might be preserved, by holding—That it is larceny, fraudulently to take the personal chattel of another against the will of the owner, with an intent to derive some benefit from the taking, other than the mere temporary use of the chattel. Here, there was no intention to deprive the master of the skins, yet, there was a benefit to be derived by the prisoner, in representing the work done upon the skins as his own, the object being to obtain the wages usually paid for such work. The work done upon the skins would be paid for twice, and that would be an injury to the master. It is not necessary that there should be an intention wholly to deprive the master of the property; it is quite sufficient if an injury to the master takes place. It is scarcely possible to give a perfectly correct definition of larceny, the circumstances of each case admit of so much variety. Hale says, that “In cases of larceny, the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intent, or the contrary; but the same must be left to the due and attentive consideration of the Judge and Jury. Wherein, the best rule is, *in dubiis*, rather to incline to acquittal than conviction” (b). Bracton’s definition, “*Contrectatio rei alienæ, fraudulenter, cum animo furandi, invito illo Domino cujus res illa fuerit* (c).” The civil law defines it as *lucri causâ* (d). Fleta and Glanville follow the definition of Bracton.

(a) *Reg. v. York, ante*, p. 21.

(b) 1 Hale, P. C. 509, (c. 43, s. 8.) See 4 Bl. C. 232; 4 Steph. Com. 157.

(c) Bracton, lib. iii. cap. 32. [See Arch. C. Pl. 182.]

(d) Just. Inst. lib. iv. tit. i. (by Harris.) “*Furtum est contractatio fraudulosa lucri faciendi gratia, vel ipsius rei, vel etiam usus ejus possessionesve.*” See also the Venice edition by Aldobrandini. The words in italics are omitted

Blackstone, in his Commentaries, seems to consider that *animus furandi* and *lucri causa* convey the same meaning. Where a party took a horse to ride, it was held not to be larceny, there being no *lucri causa*, it was a mere trespass ; but here there was a wrongful taking away, with the view of receiving a benefit in money. The use of a chattel may be a mere trespass ; but in the present instance, the prisoner took a skin of a certain value, from the fact of its being dressed, with the intention of depriving the owner of a portion of that value, by representing the labour upon it as not having been paid for. [*Parke, B.*—There must be an intention to take away ; a mere use will not make a larceny.] The case mentioned in *Foster (a)*, is somewhat similar to this. Where a man disguised himself, and robbed his own servant of goods he had committed to his care, with intent to charge the hundred, and it was held to be a larceny. It will be quite sufficient if the intention is to obtain money. [*Parke, B.*—To constitute larceny, there must be an intention to take to yourself.] In the Mirror (*b*), larceny is thus defined,—“ *Larcine est prisel d'autre moveable corporelle trecherousment contra la volonte de celuy a qu'il est pur male gaigne d'la possession, ou del use.*” — “ *Trecherousment*

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in the Berlin edition by Schrader ; as also in the Leipsic edition of 1843 by Kriegelii, Hermann, and Osenbrüggen : see, however, the note there:

(*a*) *Foster*, p. 124. “ A., having delivered money to his servant to carry to a distant place, disguised himself and robbeth the servant on the road, with intent to charge the Hundred. This, I doubt not, would be a robbery in A. ; for, in these cases ” [alluding to another of a similar nature] “ the money and goods were taken from those who had a special temporary property in them with a wicked fraudulent intention ; which is the ancient known definition of larceny, *fraudulenta contractatio rei alienæ invito Domino.* (Bract. de Cor. c. 32. *Pleta*, lib. 1, c. 289.)” See 1 Hale, 513.

(*b*) *La Somme appelle Mirroir des Justices*, c. 1, s. 10, p. 37 ; French ed. 1642. *The Mirror of the Justices* ; Eng. ed. 1646. “ *Larcine* is the treacherously taking away from another moveables corporeal, against the will of those to whom they doe belong, by evil getting of the possession of them, or the use of them.” “ It is said, treacherously, because that if the taker of them away conceive the goods to be his owne, and that he may well take them ; in such case it is no offence.”

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est dit, pur ceo que si l'esloignor entende les biens estre cyens, et qu' il les poit bien prendre, en tiel case ne se fait my ceste peche." Coke says, "Larceny, by the common law, is the felonious and fraudulent taking and carrying away, by any man or woman, of the mere personal goods of another, neither from the person, nor by night in the house of the owner." Though he adds, "It must be felonious, *i. e. animo furandi*" (a). According to the definition of, Eyre, C. J., in *Pear's* case (b), "Larceny, is the wrongful taking of goods with intent to spoil the owner of them *causâ lucri*." East (c) says, "Lord Coke, and after him, most others, have defined simple larceny to be, the felonious and fraudulent taking and carrying away by any person the mere personal goods of another, neither from the person, nor by night in the house of owner. Perhaps it may be, with as much propriety, defined at large to be, the wrongful and fraudulent taking and carrying away by any person, the mere personal goods of another from any place, with a felonious intent to convert them to his own use, and make them his own property, without the consent of the owner" (d). Blackstone defines larceny, as "The felonious taking away of the personal goods of another" (e). [*Alderson*, B.—This is rather an attempt to commit a misdemeanour; and the question is, ought the Recorder to have directed the Jury to return a verdict of Guilty, or Not Guilty? (f)]

LORD DENMAN, C. J.—A great deal certainly is to be said

(a) 3 Co. Inst. c. 47, p. 107.

(b) East. P. C. c. 16, s. 112.

(c) East. P. C. c. 16, s. 2.

(d) See 1 Hale P. C. and East, P. C. c. 16, s. 3. "There must be an actual taking or severance of the thing from the possession of the owner; for, as every larceny includes a trespass, if the party be not guilty of a trespass in the taking the goods, he cannot be guilty of felony in taking them away." (See 1 Hawk. c. 33, s. 2.)

(e) 4 Bl. Com. 230; see other definitions of larceny referred to in the first report of the Criminal Law Commissioners, p. 9.

(f) No counsel appeared on behalf of the prisoner.

in favour of holding this a larceny, because the owner is deprived of his property, for a short time, at all events; but the intention of the prisoner, as found by the Jury, protects him. If we were to hold that it is a larceny where the intention is to deprive the owner for a time only of his property, we should include many cases which might bear very hardly. It certainly would be a strange thing, if, when a servant has robbed his master, and being charged with it, says, he did not intend to steal, he only intended to cheat him, in order to increase the amount of his wages, he should not be amenable to justice; but no such case can well occur, in which the parties would not be punishable in some way or another; for if it be an unlawful attempt only to get money, it would be punishable as a misdemeanour.

PARKE, B.—This is no larceny. To constitute larceny, there must be an intention to exert an entire dominion over the thing alleged to be stolen. It is said, there is no proper definition of larceny. The best definition, however, is in East, P. C. (a), where it is said to be “The wrongful and fraudulent taking and carrying away by any person, the mere personal goods of another from any place, with a felonious intent to convert them to his own use and make them his own property without the consent of the owner.” That is, if he takes them without any colour of right; and with this addition, perhaps, the definition will be found to be correct. If a man takes a horse, merely intending to ride a distance, the offence is not larceny. *Rex v. Webb* (b) is to the same effect; that if the party, at the time of the taking, did not intend to take the property out of the possession of the owner, but merely to use it for the purpose of getting a higher reward than he was entitled to, it is not a larceny; that is precisely the present case. Here, there being no intention to deprive the owner of the property, it was no larceny. I

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(a) 1 East. P. C. 553.

(b) 1 M. C. C. 431.

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think, in this case, an essential part of the definition is not answered—the intention to make the skins his own property; the intention was merely to make a fraudulent use of them.

ALDERSON, B., and COLERIDGE, J., concurred.

COLTMAN, J.—I do not think we must look to a definition, so much as to the cases. The best way is to see what the cases have established, as the ingredients of larceny. It appears to me, there must be an intention to deprive the master of the entire property.

Lowndes.—The Court will, perhaps, consider whether certain circumstances, which are not stated in the case as submitted by the Learned Recorder, are material to the decision to which they have come: and, if so, the Court will refer back the case to the Learned Recorder to have those facts stated, there being power to do so under the Act (*a*). [He was proceeding to state what the circumstances were to which he referred, when he was stopped by the Court.]

DENMAN, C. J.—We cannot do that. When a case is submitted to us, we must decide upon it, as it stands. In settlement cases, we are particularly desirous of avoiding such a course.

Conviction quashed. (*b*)

(*a*) 11 & 12 Vict. c. 78, s. 4, enacts, “That the said Justices and Barons, where a case has been reserved for their opinion, shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended.”

(*b*) See next case, Reg. v. Hall.

THE QUEEN v. JOHN HALL.

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LARCENY.

“THE Recorder of Hull respectfully submits for the consideration of the Judges this question of law, namely, whether, under the circumstances of the following case, the conviction of John Hall, for larceny, was a good conviction.

“John Hall was tried at the last Christmas Quarter Sessions for the borough of Hull, on an indictment charging him with stealing fat and tallow, the property of John Atkin.

“John Atkin, the prosecutor, is a tallow-chandler, and the prisoner, at the time of the alleged offence, was a servant in his employment. On the morning of the 6th of December last, the prosecutor, in consequence of something that had occurred to excite his suspicions, marked a quantity of butcher's fat, which was deposited in a room immediately above the candle-room in his warehouse. In the latter room was a pair of scales used in weighing the fat, which the prosecutor bought for the purposes of his trade. At noon, the foreman and the prisoner left the warehouse to go to dinner, when the former locked the doors and carried the keys to the prosecutor. At that time there was no fat in the scales. In about ten minutes the prisoner came back and asked for the keys, which the prosecutor let him have. The prosecutor watched him into the warehouse, and saw that he took nothing in with him. In a short time he returned the keys to the prosecutor, and went away. The prosecutor then went into the candle-room, and found that all the fat which he had marked had been removed from the upper room, and, after having been put in a bag, had been placed in the scales in the candle-room. The prosecutor then went into the street, and waited until a man of the name of Wilson came up, who was shortly followed by

*Saturday,
Jan. 20,*
A, a servant to a tallow-chandler, clandestinely removed some of his master's fat from one place to another, and then, in conjunction with B, endeavoured to sell it to his master as the property of B and C. Held, that A was rightly convicted of larceny.

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the prisoner. The latter, on being asked where the fat came from that was in the scales, said it belonged to a butcher of the name of Robinson; and Wilson, in the prisoner's presence, stated that he had come to weigh the fat which he had brought from Mr. Robinson's. The prosecutor told Wilson that he would not pay him for the fat until he had seen Mr. Robinson, and left the warehouse for that purpose. Wilson immediately ran away; and the prisoner, after offering to the prosecutor's wife, if he was forgiven, to tell all, ran away too, and was not apprehended until some time afterwards, at some distance from Hull.

"I told the Jury that if they were satisfied that the prisoner removed the fat from the upper room to the candle-room, and placed it in the scales with the intention of selling it to the prosecutor as fat belonging to Mr. Robinson, and with the intention of appropriating the proceeds to his own use, the offence amounted to larceny.

"The Jury found the prisoner Guilty.

"The prisoner was not sentenced, having entered into a recognizance conditioned to appear at the next sessions to be holden for the said borough of Hull, to receive judgment.

"T. C. GRANGER,
"Recorder of Hull."

Dearsly, for the prisoner.—The question that arose at the trial was, whether or not the goods were removed with the intention of wholly depriving the owner of them. As it appears from the case, the goods were removed with the intention of returning them to the owner, coupled with the intention of depriving the owner of the value of them, but not of the goods themselves. This did not amount to the offence of larceny, but it was an attempt to get money under false pretences. He admitted the asportation, also the *lucri causa*, but there was no felonious conversion, no

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intention to deprive the owner of the permanent use of the property. The case appeared to him to be virtually disposed of in *Reg. v. Holloway* (a), and it seemed to involve the same question. [*Parke, B.*—No: the cases are different; here the prisoner divests the owner of the goods, and represents them as the property of another person.] Nevertheless, the original intention was to return the goods to the owner. [*Coleridge, J.*—In whose possession were they when they were being sold to the master? Was there not then a dominion exercised over them independent of the master's? *Alderson, B.*—In *Reg. v. Holloway* the party never intended to treat the goods but as the master's; here he does. *Parke, B.*—The intention was not to restore them to the master as his own property, but as the property of the pretended vendor.] In order to constitute larceny, three things are necessary, viz., the unlawful taking, the *lucri causa*, and the intention to deprive the owner wholly of the goods, *i. e. res ipsas*, for ever. In this all the authorities agreed; the definitions in Bracton (b), the Mirror (c), and Blackstone (d), were for the most part the same. The expressions “tractatio” in Bracton, and “prise” in the Mirror, implied a taking for ever. There must be an intention to take the goods *in specie* for ever. How could it be said the prisoner intended to take the goods for ever, when his immediate intention was to restore them to the owner? [*Coleridge, J.*—Would you contend that if a man took a horse, and intended to disfigure him, and afterwards to sell him to the owner as the property of another man, it would not be larceny?] *Mutatis mutandis*, the cases are similar. [*Alderson, B.*—The cases are certainly similar; neverthe-

(a) *Ante*, p. 40.

(b) Lib. iii. de Coronâ, c. 32, fol. 150.

(c) The Mirror of Justices, by Horne, c. 1, s. 10, p. 37.

(d) 4 Bl. Com. 230. For other definitions of larceny, see 1 Crim. Law Rep. p. 9.

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less, the case put looks very much like horse-stealing.] In taking extreme cases there is some danger of losing the right principle. Larceny is defined to be “a taking with an intention of wholly depriving the owner of his property.” Bracton (*a*) says, “*Furtum est tractatio rei alienæ fraudulenter animo furandi invito illo cujus res illa fuerit.*” General definitions, however, are seldom comprehensive enough to embrace every case which may arise. The decided cases are the best guides to the law, and all the reported cases go to show, that to constitute larceny there must be the intention of wholly depriving the owner of the goods themselves. In *Rex v. Morfit and another* (*b*), where the servants took the master’s corn, and gave it to the master’s horses, it was held to be a larceny; but this was upon the supposition that the master had been wholly deprived of the corn. In *Rex v. Phillips and another* (*c*), the jury having found that there was no intention to deprive the owner of the horses, it was held not to be a felony. If the jury in the present case had found that, if the fraud had not succeeded, the prisoner would have appropriated the goods to his own use, it might have been a larceny. In a book of general reference (*d*), after citing from Blackstone, “that the taking and carrying away must be felonious, that is, done *animo furandi*; or, as the civil law expresses it, *lucri causâ*,” which it describes as not very definite; it is said, “but larceny, so far as respects the intent with which it is committed (and the intent here is a material ingredient in the offence), may perhaps correctly be defined thus:—Where a man knowingly takes and carries away the goods of another, without any claim or pretence of right, with intent *wholly* to deprive the owner of them, and to appropriate or convert them to his own use.” [*Alderson, B.*—According to your argument,

(*a*) Lib. iii. c. 32.(*b*) Russ. & Ry. 307.(*c*) 2 East. P. C. c. 16, s. 98, p. 662.(*d*) Archbold’s Crim. Law, 182, 9th ed.

if a man were to steal a bank-note from the owner, and then take it back to him to be changed, it would not be larceny.] It would not be ; for, although the owner would be deprived of the value of the note, he would not be deprived of the note itself. It is a contradiction in terms to say, that the intention of the party is to deprive the owner of the very goods which he restored to him. Here it is admitted that such was the original intention, and therefore it is not larceny.

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Archbold, for the Crown, was not called upon.

LORD DENMAN, C. J.—The taking in this case is admitted. The *animus furandi* depends upon the intention of the party permanently to deprive the owner of the goods. How can it be more manifest than when a party deprives the owner of his goods, and then endeavours to sell them to him as the property of another? The case of a bank-note is ingeniously put, but nothing can be more extreme than the case itself.

PARKE, B.—I am of opinion the prisoner was rightly convicted. The goods are taken out of the dominion of the master, and placed in the hands of a pretended vendor to sell to the party to whom they really belong, and if not sold he is to take them away again. It is a very different case from *Reg. v. Holloway*.

ALDERSON, B.—The party never meant to restore the goods to the owner, except upon a contract that he should pay the full value for them.

COLERIDGE, and COLTMAN, JJ. concurred.

Conviction affirmed.

REG. v. READ AND OTHERS.

COMMON ASSAULT.

1849.

*Saturday,
Jan. 20.*

Some boys had connexion with a girl nine years of age. The jury found them "*Guilty, the girl being an assenting party ; but that from her tender years she did not know what she was about.*" Held, that they could not be convicted of an assault.

CASE.—To the Justices of either Bench and Barons of the Exchequer.

"Surrey, to wit—At the General Quarter Sessions of the Peace, of our Sovereign Lady the Queen, at St. Mary, Newington, in and for the said county of Surrey, on Tuesday, the 12th day of January, 1849.

"George Read, late of the parish of Wimbledon, in the county of Surrey ; Ralph Read, late of the same parish ; and John Barlow, late of the same parish ; aged respectively, thirteen, twelve, and eleven years ;—were charged in the same indictment with a common assault, on Elizabeth Ellen Serle, a girl nine years of age.

"It was proved at the trial, that the four parties went into a hay-loft, where each of the three boys had connexion with the girl, and penetration was effected in each case. When the boys first began to take liberties the girl showed some unwillingness, but eventually, she ceased to offer any opposition, and apparently assented."

"The verdict of the jury, was 'Guilty, the child being an assenting party ; but that from her tender years she did not know what she was about.'"

"The question for the opinion of the Court is, Whether, under the peculiar circumstances of the case, the girl, being of the age of nine years only, actually did give, or was competent to give such an assent to the act in question, as to invalidate the conviction for a common assault.

"THOMAS PUCKLE,

"Chairman of the Sessions."

"Jan. 10, 1849."

Needham, for the prisoners, relied upon *Reg. v. Martin (a)*. 1849.

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Robinson, for the prosecution, submitted, that the verdict amounted to "guilty." For if anything more than that word was to be looked at, then the whole of the context must be taken into consideration, and the one part would control the other. The question really was, Whether a child of nine years of age could give an assent to such an act. The presumption of law was, that she could not consent to any injury to be committed upon her; it was contrary to the policy of the law that she should be allowed to do so, for the law always protects those who from their infancy cannot protect themselves. [*Alderson*, B.—This point has been decided in *Reg. v. Martin*.] That case was to be distinguished: there the child was above ten years of age, and the Act draws a distinction where the child is under, and where above ten years; there, also, the jury found, without any qualification, that the child consented; in this case the jury found, not, simply, that she consented, but that she consented not knowing what she was about. This was virtually no consent at all. It was the assent of a person incapable of giving assent, a mere mechanical assent, as of an automaton. In *Reg. v. Saunders (b)*, the woman consented, not knowing but that the man was her husband, and although she so consented the prisoner was found guilty of an assault. *Reg. v. Williams (c)* was to the same effect. In this case the child consented, not knowing what she was about. [*Alderson*, B.—The meaning of the jury is, that she was an actually assenting party, but that she could not by law assent.] Which meant that she had not a mind to consent, and, therefore, could not be a consenting party. The question was, whether she gave such an assent as would justify the assault com-

(a) 2 M. C. C. 123; 9 C. & P. 213-215, S. C.

(b) 8 C. & P. 265.

(c) 8 C. & P. 286.

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mitted upon her. If a child, two or three years of age, assented to a man, the same verdict might be returned. [*Coleridge, J.*—Here the jury say, that the girl was an assenting party to the connexion; no jury would find that a child of two or three years of age consented.] Supposing a child to have a sovereign, and a man to ask her for it, upon which she gives it to him, and he runs away with it; it could not be contended that he was not guilty of a felony. Here the verdict was, in effect, the same as if the jury had found that the girl was an idiot, incapable of assenting. [*Alderson, B.*—Suppose the jury to have found that the idiot assented; what then? *Coltman, J.*—Referred to the cases of *Reg. v. Banks (a)*, and *Reg. v. Meredith (b)*.] This case was distinguishable from those; because, although the jury found that the child assented, they also found her to be incapable, which rebutted the assent.

LORD DENMAN, C. J.—I think the jury would have been justified in finding the prisoners guilty; they have, however, found that the child was an assenting party. If she gave an actual assent, it could not be an assault. It has been so held in several cases.

PARKE and ALDERSON, BB.; COLERIDGE and COLTMAN, JJ., concurred (c).

(a) 8 C. & P. 574. The prisoner was indicted, "That he feloniously did make an assault on M. H., and her the said M. H. then and there feloniously did unlawfully and carnally know and abuse," &c. The child, who was nine years of age, consented. *Patteson, J.*, was of opinion, that the prisoner could not under such circumstances be convicted of an assault; and, therefore, directed the jury to find the prisoner guilty upon the whole charge, or acquit him.

(b) 8 C. & P. 589.

(c) The law presumes, that a male infant under fourteen years of age is impotent and incapable of sexual intercourse. He may, however, be a principal in the second degree, as aiding and assisting, if the circumstances show that he had a mischievous discretion.—1 Hale's P. C. c. 58, p. 730.

REG. v. HENRY ALLEN.

Case stated by the Hon. Baron Rolfe.

SODOMY.

1849.
Saturday,
Jan. 20.

“AT the December Sessions of the Central Criminal Court, Henry Allen was tried before me for an unnatural crime.

Consentient
convicted,
agent being
12 years of
age.

“The first count charged that the said Henry Allen in and upon one John Wood feloniously did lay his hands, and then and there feloniously, wickedly, diabolically, and against the order of nature had a venereal affair with the said John Wood, and him the said John Wood then and there carnally knew, and then and there feloniously, wickedly, diabolically, and against the order of nature, with the said John Wood did commit and perpetrate the detestable, abominable, and horrid crime of, &c. &c.

“The second count charged that the prisoner feloniously, wickedly, diabolically, and against the order of nature, was consenting to and did permit and suffer the said John Wood, feloniously, wickedly, diabolically, and against the order of nature, to have a venereal affair with him the said Henry Allen, and with him the said Henry Allen then and there feloniously, wickedly, diabolically, and against the order of nature, to carnally know him the said Henry Allen, and with him the said Henry Allen then and there feloniously, wickedly, diabolically, and against the order of nature, to commit and perpetrate the detestable, abominable, and horrible crime of, &c. And that the said Henry Allen did then and there feloniously, wickedly, diabolically, and against the order of nature, commit and perpetrate with the said John Wood the detestable, abominable, and horrid crime aforesaid, against the form of, &c.

“The facts proved were, that the prisoner induced John Wood, a boy *twelve years of age*, to have carnal knowledge

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of his person, the prisoner having been the pathic in the crime.

“The jury found the prisoner guilty, but I had doubt whether the facts supported either count, for reasons which will be obvious.

“I request the opinion of the Judges on the case.

“R. M. ROLFE.”

The case was not argued by counsel.

LORD DENMAN, C. J.—We are all of opinion that the conviction is good.

See 12 Rep. 36; 1 Hawk. c. 4; 9 Geo. IV. c. 31, s. 18; and see *ante*, p. 54, note (c).



REG. v. SARAH WATERS.

Case stated by the Honourable Baron Rolfe.

MURDER.

“THE prisoner was tried before me, at the last December Session of the Central Criminal Court, on a charge of murder.

1849.
Saturday,
Jan. 20.

“The first count of the indictment charged that the prisoner, ‘in and upon a certain infant female child, born of the body of her the said Sarah Waters, and of tender age, to wit, of about the age of two days, and not named, feloniously and of her malice aforethought, did make an assault,’ and it then went on to charge that she caused the child to take poison, and so murdered her.

An indictment for causing (qy. not preventing) the death of an infant child, by a mere *non-feasance*, without any statement of the age, or incapacity on the part, of the child to take care of itself, is bad.

Qy. Whether describing it as an infant child, *of tender years*, is sufficient.

“The second count of the indictment was as follows:—

“‘And the jurors aforesaid, upon their oaths aforesaid, do further present that the said Sarah Waters afterwards, to wit, on the day aforesaid, and in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Court, in and upon the said infant female child, so born of the body of her the said Sarah Waters, and not named as aforesaid, in the peace of God, and our said lady the Queen, then and there being, feloniously and wilfully, and of her malice aforethought, did make an assault; and that she, the said Sarah Waters, with both her hands, the said infant female child in and upon a certain heap of dust and ashes, there situate and being in the open air, there feloniously and wilfully, and of her malice aforethought, did cast and throw; And that the said Sarah Waters feloniously, wilfully, and of her malice aforethought, did then and there leave the

But an indictment for causing the death of an infant child by a *misfeasance*, as casting and throwing on a heap of ashes (and leaving it there exposed, &c.) is sufficient, without any statement of the age, if the death of the child be traced to that act.

“Not named,” when

consistent with the fact, is a sufficient description in such an indictment—*aliter*, not baptized.

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said infant female child in and upon the said heap of dust and ashes in the open air, there, as aforesaid, exposed to the cold air for a long space of time, to wit, for the space of twelve hours, by means of which said exposure to the cold air, as aforesaid, the said infant female child became mortally chilled, benumbed, and frozen in her body; of which said exposure to the cold air and of the mortal chilling, benumbing, and freezing in her body, thereby occasioned, the said infant female child then and there died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Sarah Waters the said infant female child in manner and form last aforesaid feloniously, wilfully, and of her malice aforethought, did kill and murder against the peace of our said lady the Queen, her crown, and dignity.'

"The prisoner was also charged on the Coroner's inquisition, which charged—

" 'That Sarah Waters, late of the parish of St. Mary, Whitechapel, in the county of Middlesex, on the 21st day of November, in the year aforesaid, at the parish last aforesaid, in the county aforesaid, the said female child from her body, by the providence of God, did bring forth alive; and that the said Sarah Waters, not having the fear of God before her eyes but being moved and seduced by the instigation of the devil, afterwards, to wit, on the 23rd day of November, in the year aforesaid, at the said parish of St. George, Hanover Square, in the said liberty, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, in and upon the said female child so alive, and in the peace of God and of our said lady the Queen, then and there being, feloniously, wilfully, and of her malice aforethought did make an assault; and that the said Sarah Waters the said female child, so being alive then and there, did take and carry to a certain dunghole in a certain mews there situate, and the said female child, so being alive, then and there feloniously, wilfully, and of her malice aforethought in

the said dunghole did hide, secrete, and conceal; and the said female child, so being alive and so being hidden, secreted, and concealed, she, the said Sarah Waters, then and there feloniously, wilfully, and of her malice aforethought, did desert and leave exposed to the inclemency of the weather; and the said female child so being alive, and so being hidden, secreted, and concealed, to nourish, sustain, and support, she, the said Sarah Waters, feloniously, wilfully, and of her malice aforethought, did then and there wholly neglect and refuse. By means of which said hiding, secreting, concealing and deserting, and leaving exposed to the inclemency of the weather, of the said female child by the said Sarah Waters, and also by reason of the said neglect and refusal of the said Sarah Waters the said female child to nourish, sustain, and support, the said female child then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said Sarah Waters, her, the said female child, in manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder, against the peace of our said lady the Queen, her crown, and dignity.'

"At the trial, the jury found the prisoner guilty of manslaughter on the second count only of the indictment, and also on the Coroner's inquisition.

"A motion was made in arrest of judgment, on the ground that the second count of the indictment states no crime. The age being laid under a *videlicet*, it is consistent with all which is stated in the count that the child might be of the age of twenty years, and capable of taking care of herself, and so able to have prevented the ill effects of the exposure which is the sole cause of death alleged.

"I thought the objection good, and I did not think it safe to rely on the Coroner's inquisition, because the name of the child is not there stated, nor any reason given for its omission; and, even in the indictment, it seems to me doubtful

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whether the statement, that the child had not been named, is sufficient to dispense with the statement of its name, for *non constat* that it might not have acquired a name by reputation.

“As to the necessity of stating the name, see *Reg. v. Biss*, 2 Moo. 93, and *Reg. v. Stroud*, 2 Moo. 270.

“I have to request the opinion of the Judges, whether either the second count of the indictment or the Coroner’s inquisition is sufficient to warrant a judgment for manslaughter.”

Clerk, for the prosecution.—The second count of the indictment stated, that the prisoner in and upon the *said* infant female child, made an assault, and placed her upon a heap of ashes, and left her there, by which means her death was occasioned. The question is, first, whether there is a sufficient description of the child; secondly, whether the cause of death is sufficiently stated. The cases referred to, *Reg. v. Biss* and *Reg. v. Stroud*, did not decide this case. [*Lord Denman*, C. J.—None of us doubt as to the name; but you had better argue the whole case.] With regard to the age, by the first count it is stated, that the child was of tender years, to wit, the age of two days, and that it was born of the body of Sarah Waters; the second count then refers to the *said* infant female child so born of the body of the said Sarah Waters, that is, born two days. It is not like the case of *Reg. v. Martin (a)*, where the reference to the first count was simply, “the said E. R.” without a statement of any age. [*Coleridge*, J.—So born, means merely born of the body of Sarah Waters.] But the age of the child was immaterial if the act charged was of such a nature that death was likely to ensue. Here an indictable offence was charged in the second count of the indictment, because it charged an offence to have been committed which caused death. [*Alderson*, B.—The death is

(a) 9 C. & P. 215.

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caused by two acts, throwing the child upon the ashes, and, leaving her there. If a person, twenty years of age, were thrown down and left, the throwing down would be unlawful, not so the leaving; but it is otherwise to throw down and leave a child of tender years.] Upon the Coroner's inquisition the day of the birth is stated, so that the age necessarily appears. In *Reg. v. Willis (a)*, which was an indictment against a single woman for a like offence, the conviction was held good; although it was objected, that the indictment neither stated the name of the child, nor that its name was to the jurors unknown, nor that it had no name. [*Coleridge, J.*—In the copy of the inquisition, as set out in this case, it is not charged that the woman was a single woman, and therefore it does not appear that it was, as in *Willis's* case, an illegitimate child.] It certainly does not so appear upon the case submitted, but it was so stated in the indictment. [*Lord Denman, C. J.*—I do not know that it is necessary to show that the child had no name.] In *Rex v. Biss*, the child was born in lawful wedlock, and therefore must have had a name. [*Alderson, B.*—Has a child born in wedlock necessarily a name? The surname of the ancestor has not been from all times adopted.] It is laid down in *Coke (b)*, that the child (when born in wedlock) takes the cognomen of the father, the agnomen is taken afterwards. In this case, the child having no name by which it could have been described, the indictment was sufficient.

Cur. ad vult.

(a) 1 C. & K. 722.

(b) *Quare*, 6 Rep. 65 a, "Cognomen majorum est ex sanguine tractum, hoc intrinsec' est, agnomen extrinsec' ab eventu." This appears to be merely explanatory.

The Romans had two, three, four, or more names. 1. The *Prænomen*, answering, for secular purposes, to our Christian name. 2. The *nomen* or gentile name (that of their gens); no Roman was without this name. 3. The *cognomen*, or family name. 4. The *agnomen*, or name of honour. Generally the women had not a prænomen, but added after the family name, *prima*, *secunda*, &c., or if but two, major and minor.

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PARKE, B., subsequently (a) delivered the judgment of the Court, as follows:—If the second count of the indictment had charged the prisoner with causing the death of the deceased by a mere nonfeasance, the neglect of her maternal duty towards her child, it would have been bad; because the indictment ought to have stated the child to have been of such an age, or in such a situation as to be unable to take care of itself. Supposing an averment, that the child was of tender years, would have imported such an inability; there is no averment in this count that the child was of tender years, for the reference, in the commencement of it, to the first count, does not import that description. It contains no more than an averment, that the child was an infant female, born of the prisoner's body, and not named. (See opinion of Mr. Justice Patteson, *Reg. v. Martin*, 6 C. & P. 217.)

But this count charged the prisoner with a misfeasance, a wrongful act in assaulting the child, and casting and throwing her on a dust heap; and if the death of the child is traced to this act, the offence of manslaughter is complete.

Is it then traced to this wrongful act?

It is alleged, that the prisoner having cast and thrown the deceased on the heap of dust, left her there; that is, permitted her to continue there, exposed to the cold air, by means of which exposure she was benumbed and died.

The exposure, therefore, is charged against the prisoner, and the death is attributed to the exposure.

It is not expressly averred in this case, that the child was of such tender years, or so feeble that she could not walk away and take care of herself; but that is implied, for if she had been sufficiently old, or strong to do so, the death would not have arisen from the exposure by the prisoner, but from the act of the child in not walking away and taking care of herself.

(a) January 30.

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Thus, it is established, that if, in an action on the case, a neglect is charged against the defendant, by reason whereof the plaintiff had sustained damage, the question, whether the plaintiff could have avoided that damage, by the exercise of ordinary care, is always open on not guilty; and after verdict, it is presumed that the jury have found the fact of the neglect, and also found that the consequential damage was not caused by the want of ordinary care in the plaintiff. (*Bridge v. Grand Junction Railway Company*, 3 M. & W. 248; *Goldthorpe v. Hardman*, 13 M. & W. 377, and 14 L. J., N. S., Ex. 61.) In this case, the jury could not have found the prisoner guilty, without actually negating the power of the child to take care of herself, and escape the consequences of the unlawful act of the prisoner; and, consequently, after verdict, that fact must be implied. I think, therefore, that the count is good in this respect.

A doubt occurred to the learned Judge, whether the description of the child, as being “not named,” was sufficient. “Not baptized,” would not have been enough, but “not named,” which means that she had acquired no name, either by baptism or usage, appears to be quite sufficient.

Conviction affirmed.

In the primitive state of society, the usage was undoubtedly to name each man by a single word (as in Britain, Caractacus, &c.); hence it is evident that the son's name must have been different from the father's. Note the Hebrew genealogies. With the Saxons, the primitive system was prevalent up to, and during the whole period when the descendants of Hengist had supreme authority in this island; for instance, *Harold*, *Gurth*, *Alfred*, *Ulf*. Passing on to much later times, we find in Camden's Remains concerning Britain, an instance of the descendants of one *Brereton* assuming a great variety of surnames. (See Ed. 1637, p. 141.) The present practice, however, became somewhat generally established about the middle of the fourteenth century; since when the surname has been generally used to distinguish the stock or root (the *stirps*) to which each individual belongs. It is a mere name of *reputation*. Such name, it seems, may be altered, legally and effectually, at the will of the party bearing it; and a subsequently assumed name, when it becomes the

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name by which the individual is generally known and addressed (not by one or two persons only, see however *Reg. v. Evans*, 8 C. & P. 765), is apparently as available as the original name in all legal proceedings (3 M. & S. 453; Com. Dig. "Abatement," E. 19; and see *Luscombe v. Yates*, 5 B. & A. 544; *Davies v. Lowndes*, 1 Bing. N. C. 597). "A bastard is *terminus a quo*, he is the first of his family, for he has no relation of which the law takes any notice" (3 Salk. 66); and although illegitimate children may acquire the reputation of children, so as to take under a will by the description of the children of their reputed father (6 Rep. 65 *a*); yet an illegitimate child cannot be described by the name of the father, if it has not been so christened, or obtained the name by reputation (*Rex v. Clark*, Russ. & Ry. C. C. R. 358; *Reg. v. Evans*, 8 C. & P. 765; *Rex v. Smith*, 1 M. C. C. 402; *Rex v. Waters*, 7 C. & P. 250). But the more important name, that which is used in all the more solemn acts of life, is the name given at baptism, the *Christian* name: it is that which is properly the name, and not the surname. Thus a man cannot have two Christian names at one and the same time (*Evans v. King*, Willes, 555; Co. Lit. 3 *a*), as John *alias* James (*Rex v. Newman*, 1 Ld. Raym. 562); yet he may be christened by several names, as John James William, the whole forming but one Christian name (*Scott v. Soans*, 3 East, 111; and see *Walker and Co. v. Parkins*, 2 D. & L. 982). It is said that if a man be baptized by one name, and confirmed by another, he shall be named in actions according to the confirmation, and not according to the Christian name (Vin. Ab. Nosmes (A), see Co. Lit. 3 *a*; Th. D. lib. iii. c. 1, s. 7); but, "Since the Reformation a party cannot take a second Christian name at confirmation. That could only be done in Roman Catholic times. In the reformed church, it is true, the bishop lays hands on the person to be confirmed, but he does not give him any additional name" (Per Parke, B., in *Williams v. Briant*, 7 Dowl. 506). And it appears that it suffices if the proper or Christian name be joined with a sufficient description of the person, as A., the son of B. (Com. Dig. "Abatement," F. 18); or with a name of dignity (*Ib.*). Yet a man may have divers surnames at divers times (Co. Lit. 3 *a*); so he may be described by a second surname if it be laid under an *alias*, for a man may be known by two surnames (Com. Dig. "Abatement," F. 18; and see 3 Salk. 238). Thus he may be indicted or described as Richard Wilson *alias* Richard Sayer (Arch. C. Pl. 27); but Richard Wilson *alias* John Wilson would be bad.

Names of persons not christened are surnames only (Ld. Raym. 305); *qy.* the name of a Jew received at circumcision.

It is said that a title of dignity is part of the name of the person who has it as much as a *Christian* name (Ld. Raym. 303, 859); not so the state of an esquire or gentleman (2 Inst. 594); a man, however, cannot acquire a name of honour by reputation, since honour is conferred by none but by the Crown (Ld. Raym. 304), although in former times some titles were conferred by great lords, but this was supposed to have been by virtue of a charter (*Ib.* 304); but a name of dignity may be supported by reputation, where there is a foundation for it, as when a grant is made to the eldest son of an earl by the name of viscount of such a place (*Ib.* 304). A peer of the realm, *e. g.* an earl, must sue by his name of baptism, as an earl (Th. D. lib. iii. c. 1, s. 6). A religious man professed, by his name of dignity without his Christian name; as an abbot

(*Ib.*; see Co. Lit. 3 *a*). "In pleading, the proper name of a dean must be shewed," for dean, archdeacon, and præcentor are not names of dignity (Com. Dig. "Abatement," F. 19).

A lower degree or title is not lost in a higher one, but both stand together: as, if a knight be created a baronet, he remains a knight still; but if an esquire, which is no name of dignity (see Com. Dig. "Abatement," F. 19), be made a knight, the degree of esquire is gone; and the party cannot be so named in any judicial proceeding (2 Inst. 594), but when a knight and baronet, he must be so styled (Com. Dig. "Abatement," F. 19).

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WATERS.

EASTER TERM,
IN
THE TWELFTH YEAR OF THE REIGN OF VICTORIA.

CONSIDERED BY

POLLOCK, C. B.,	COLTMAN, J.,
PARKE, B.,	ROLFE, B.,
PATTESON, J.,	CRESSWELL, J.,
WILLIAMS, J.	



THE QUEEN *against* THURBORN.

Case reserved by the Right Honourable Baron Parke.

LARCENY.

“THE prisoner was tried before me at the last assizes (a),
at Huntingdon, for stealing a bank-note.

1849.
Monday,
April 30.

The prisoner
found a bank-
note in the high
road ; at that
time, he had no

(a) Summer Assizes, 1848.

means of discovering the owner, nor any reason to believe that the owner knew where to find it ; he picked it up, intending to appropriate it to his own use ; the next day he was informed who was the owner ; he afterwards did appropriate it to his own use. Held, that he was not guilty of larceny.

In order to constitute the crime of larceny, there must be (at least) a taking of the chattels of another *animo furandi*, and against the will of the owner.

By *animo furandi* is to be understood the intention not to take a partial or temporary, but the entire dominion over the chattels, without a colour of right.

The crime of larceny cannot be committed unless the goods taken appear to have an owner, and the party taking must know or believe that the taking is against the will of that owner.

A person who finds goods which are lost may convert them *animo furandi* under some circumstances, so as not to be guilty of larceny—as in the taking of waif and treasure-trove, which are really goods without an owner—the taker would not be guilty of larceny, though he took originally *animo furandi* : so, when a person finds a purse in the highway, and takes it *animo furandi*, not being presumed to know the owner, nor having at the time the means of discovering him, it is not felony.

To prevent the taking of goods from being larceny, it is essential that they should be taken under such circumstances as that the owner would be reasonably presumed by the taker to have abandoned them, or at least, not to know where to find them. If a man, therefore, finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them *animo furandi*, really believing when he takes them that the owner cannot be found, it is not larceny ; but, if he reasonably believes that the owner can be found, it is larceny.

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“ He found the note, which had been accidentally dropped in the high road. There was no name or mark on it indicating who was the owner, nor were there any circumstances attending the finding which would enable him to discover to whom the note belonged when he picked it up ; nor had he any reason to believe that the owner knew where to find it again. The prisoner meant to appropriate it to his own use when he picked it up.

“ The day after, and before he had disposed of it, he was informed that the prosecutor was the owner, and had dropped it accidentally. He then changed it, and appropriated the money taken to his own use. The jury found that he had reason to believe, and did believe, it to be the prosecutor’s property before he thus changed the note.

“ I directed a verdict of guilty, intimating that I should reserve the case for further consideration. Upon conferring with my brother Maule, it seemed to us that the original taking was not felonious, and that in the subsequent disposal of it there was no taking, and therefore I declined to pass sentence, and ordered the prisoner to be discharged on entering into his own recognizance to appear when called upon.

“ I request the advice of the Judges.

“ J. PARKE.”

No counsel appeared on either side : the case however being one of considerable importance received much consideration from the Judges above named.

PARKE, B., delivered the judgment of the Court (a) as follows :—“ In order to constitute the crime of larceny, there must be a taking of the chattel of another *animo furandi*, and against the will of the owner. This is not the full definition of larceny, but so much only of it as is necessary to be referred to for the present purpose. By

(a) On 30th April, 1849.

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the term *animo furandi* is to be understood the intention to take, not a partial or temporary, but the entire dominion over the chattel without a colour of right. As the rule of law founded on justice and reason is, that, *actus non facit reum nisi mens sit rea*, the guilt of the accused must depend on the circumstances as they appear to him; and the crime of larceny cannot be committed unless the goods taken appear to have an owner, and the party taking must know or believe that the taking is against the will of that owner.

“In the earliest times it was held, that chattels which were apparently without an owner, *nullius in bonis*, could not be the subject of larceny. Staunforde, one of the oldest authorities on criminal law, who was a Judge in the reign of Philip and Mary, says (B. I. Ch. 16), ‘Treasure-trove, wreck of the sea, waif or stray, taken and carried away, is not felony. *Quia dominus rerum non apparet, ideo cujus sunt incertum est.*’ For this he quotes Fitz. Abr. tit. Coron. 187, 265 (a). These passages are taken from 22 Ass. pl. 99, 22 Edw. III., and mention only ‘Treasure-trove,’ ‘Wreck,’ and ‘Waif.’ And Fitzherbert says the punishment for taking such is not the loss of life or limb. The passage in 3 Inst. 108, goes beyond this. Lord Coke mentions three circumstances as material in larceny—‘First, the taking must be felonious, which he explains; secondly, it must be an actual taking, which he also explains; and, thirdly, it is not by trover or finding.’ He then proceeds as follows:—‘If one lose his goods and another find them, though he convert them *animo furandi* to his own use, it is not larceny, for the first taking is lawful. So if one find treasure-trove, or waif, or stray (here wreck is omitted and stray introduced), and convert them *ut supra*, it is no larceny, both in respect of the finding, and that *dominus rerum non apparet.*’ The only

(a) Fol. 253.

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authority given is that before mentioned, 22 Ass. pl. 99, Fitz. Abr. Coron. 265, 22 Edw. III.

“Now treasure-trove and waif seem to be subject to a different consideration from goods lost. Treasure-trove is properly money supposed to have been hid by some owner since deceased, the secret of the deposit having perished, and therefore belongs to the crown: as to a waif, the original owner loses his right to the property by neglecting to pursue the thief. The very circumstances under which these are assumed to have been taken and converted show that they could not be taken from any one, there being no owner. Wreck and stray are not exactly on the same footing as treasure-trove and waif. Wreck is not properly so called if the real owner is known; and it is not forfeited until after a year and a day. The word ‘estray’ is used in the books in different senses, as may be seen in Com. Dig. ‘Waife’ (F), where it is used in the sense of cattle forfeited after being in a manor one year and one day without challenge, after being proclaimed, when the property vests in the crown, or its grantee of estrays; and also of cattle straying in the manor before they are so forfeited. Blackstone (2, fol. 561, Stephen’s edit.) defines estrays to be ‘such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them, in which case the law gives them to the sovereign.’

“In the passage in Staunforde no doubt the word is used, not exclusively in the former sense, but generally as to all stray cattle not seized by the lord. Now treasure-trove and waif properly so called are clearly *bona vacantia*, *nullius in bonis*, and but for the prerogative would belong to the first finder absolutely. *Hæ quæ nullius in bonis sunt et olim fuerunt inventoris de jure naturali jam efficiuntur principis de jure gentium.* (Bracton (a).) Wreck and stray, in the sense we ascribe to those words, are not

(a) Lib. i. c. 12.

in the same situation, for the right of the owner is not forfeited until the end of a year and a day; but Lord Coke, in *Constable's case* (5 Rep. 108, a), treats wreck also as *nullius in bonis*, and estrays, *animalia vagantia*, he terms *vacantia*, because none claims their property. Wreck and stray however before seizure closely resemble goods lost, of which the owner has not the actual possession, and afford an analogy to which Lord Coke refers in the passage above cited.

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“Whether Lord Coke means, what the language at first sight imports, that under no circumstances could the taker of goods really lost and found be guilty of larceny is not clear; but the passage is a complete and satisfactory authority, that a person who finds goods which are lost may convert them *animo furandi* under some circumstances, so as not to be guilty of larceny. The two reasons assigned by him are, that the person taking has a right in respect of the finding, and also that they are apparently without an owner. *Dominus rerum non apparet*, an owner, or the owner does not appear.

“The first of these reasons has led to the opinion that the real meaning of Lord Coke was not that every finder of lost goods, who takes *animo furandi*, is not guilty of felony; but that if one finds and innocently takes possession, meaning to keep for the real owner, and afterwards changes his mind and converts to his own use, he is not a felon on the principle that Lord Coke had previously laid down, that ‘the intent to steal must be when the thing stolen cometh to his possession;’ for if he hath the possession of it once lawfully, though he hath *animum furandi* afterwards, and carrieth it away afterwards, it is no larceny; and Lord Coke also cites Glanville—‘*Furtum non est ubi initium habet detentionis per dominium rei.*’

“It is said therefore that the case of finding is an instance of this beginning with lawful title, which consequently

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cannot become a felony by subsequent conversion ; but if it be originally taken, not for the true owner but with intent to appropriate it to his own use, it is a felony ; and of this opinion the Commissioners for the Amendment of the Criminal Law appear to have been, as stated in their first report.

“This opinion appears not to be well founded, for Lord Coke puts the case of lost goods on the same footing as waif and treasure-trove, which are really *bona vacantia*, goods without an owner, and with respect to which, we apprehend that a person would not be guilty of larceny, though he took originally *animo furandi*, that is, with the intent not to take a partial or temporary possession, but to usurp the entire dominion over them ; and the previous observations have reference to cases in which the original possession of the chattel stolen is with the consent of, or by contract with, the owner. But any doubt on this question is removed by what is said by Lord Hale (1 P. C. 506): “If A. find the purse of B. in the highway, and take it and carry it away, and hath all the circumstances that may prove it to be done *animo furandi*, as denying it or secreting it, yet it is not felony.”

“The like in case of taking of a wreck or treasure-trove (citing 22 Ass. 99), or a waif or stray. Lord Coke clearly considers, that if lost goods are taken originally *animo furandi* in the sense above-mentioned, the taker is not a felon ; and when it is considered that by the common law, larceny to the value of above tweldepence was punishable by death, and that the quality of the act in taking *animo furandi* goods from the possession of the owner, differs from that of taking them, when no longer in his possession, and *quasi derelictum*, its injurious effect on the interests of society (the true ground for the punishment of crimes), it is not surprising that such a rule should be established, and it is founded on strict justice : for the cases of abstraction

of lost property,—of rare occurrence when compared with the frequent violations of property, in the possession of an owner,—there was no need of so severe a sanative, and the civil remedy might be deemed amply sufficient. Hawkins, (b. i. ch. 33, sect. 4,) says, ‘Our law, which punishes all theft with death, if the thing stolen be above the value of twelvecpence, and with corporal punishment if under, rather chooses to deal with them as civil than criminal offences, perhaps for this reason, in the above-mentioned case, concerning goods lost, because the party is not much aggrieved, where nothing is taken but what he had lost before.’ It cannot indeed be doubted, that if at this day the punishment of death was assigned to larceny, and usually carried into effect, the appropriation of lost goods would never have been held to constitute that offence ; and it is certain that the alteration of punishment cannot alter the definition of the offence.

“To prevent however the taking of goods from being larceny, it is essential that they should be presumably lost ; that is, that they should be taken in such a place and under such circumstances, as that the owner would be reasonably presumed by the taker to have abandoned them, or at least not to know where to find them. Therefore, if a horse is found feeding on an open common, or on the side of a public road, or a watch found apparently hidden in a hay-stack, the taking of these would be larceny, because the taker had no right to presume, that the owner did not know where to find them, and consequently, had no right to treat them as lost goods. In the present case there is no doubt that the bank note was lost ; the owner did not know where to find it ; the prisoner reasonably believed it to be lost—he had no reason to know to whom it belonged, and therefore though he took it with the intent not of taking a partial or temporary, but the entire dominion over it, the act of taking did not in our opinion, constitute the crime of larceny. Whether the subsequent appropriation to his own

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use by changing it, with the knowledge at that time that it belonged to the prosecutor, does amount to that crime, will be afterwards considered.

“ It appears, however, that goods which do fall within the category of lost goods, and which the taker justly believes to have been lost, may be taken and converted, so as to constitute the crime of larceny, when the party finding may be presumed to know the owner of them, or there is any mark upon them, presumably known by him, by which the owner can be ascertained. Whether this is a qualification introduced in modern times, or which always existed, we need not determine. It may have proceeded on the construction of the reason of the old rule, *Quia Dominus rerum non apparet ideo cujus sunt incertum est* ; and the rule is held not to apply when it is certain who is the owner : but the authorities are many, and we believe this qualification has been so generally adopted in practice, that we must therefore consider it to be established law. There are many reported cases on this subject. Some where the owner of the goods may be presumed to be known, from the circumstances under which they are found. Amongst these are mentioned the cases of articles left in hackney-coaches by passengers, which the coachman appropriated to his own use, or a pocket-book found in a coat sent to a tailor to be repaired, and abstracted and opened by him. In these cases the appropriation has been held to be larceny. Perhaps these cases might be classed amongst those in which the taker is not justified in concluding that the goods were lost ; because there is little doubt he must have believed, that the owner would know where to find them again, and he had no pretence to consider them abandoned, or derelict. (*Lamb's case*, 2 East, P. C. 16, 599—664 ; *Wynne's case*, Lea. 460 ; *Sear's case*, *ib.* 463, n. (a).) Some cases appear to have been decided on the ground of bail-

(a) These references apply to the 3rd edit. of Leach : in last edit. pp. 413—415, n.

ment, determined by breaking bulk, which would constitute a trespass, as *Wynne's case*; but it seems difficult to apply that doctrine which belongs to bailment, where a special property is acquired by contract, to any case of goods, merely lost and found, where a special property is acquired by finding. The appropriation of goods by the finder has also been held to be larceny, where the owner could be found out by some mark on them, as in the case of lost notes, cheques or bills, with the owner's name upon them.

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“This subject was considered in the case of *Merry v. Green*, (7 M. & W. 623,) in which the Court of Exchequer acted upon the authority of these decisions; and in the argument in that case difficulties were suggested, whether the crime of larceny could be committed in the case of a marked article, a cheque for instance, with the name of the owner on it, where a person originally took it up, intending to look at it, and see who was the owner, and then as soon as he knew whose it was, took it, *animo furandi*; as in order to constitute a larceny the taking must be a trespass, and it was asked, when in such a case the trespass was committed. In answer to that inquiry the dictum attributed to me in the report was used; that in such a case the trespass must be taken to have been committed, not when he took it up to look at it, and see whose it was, but afterwards when he appropriated it to his own use, *animo furandi*.

“It is quite a mistake to suppose, as Mr. Greaves has done (Vol. II. p. 14), that I meant to lay down the proposition in the general terms contained in the extract from the report of the case in 7 M. & W., which taken alone, seems to be applicable to every case of finding unmarked as well as marked property. It was meant to apply to the latter only.

“The result of these authorities is that the rule of law on this subject seems to be, that if a man find goods that have

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been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them, that the owner cannot be found, it is not larceny. But if he take them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny.

“In applying this rule, as indeed in the application of all fixed rules, questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the mark upon it. In some cases it would be apparent, in others appear only after examination. It would probably be presumed that the taker would examine the chattel as an honest man ought to do at the time of taking it, and if he did not restore it to the owner the jury might conclude that he took it when he took complete possession of it *animo furandi*. The mere taking it up to look at it, would not be a taking possession of the chattel.

“To apply these rules to the present case: the first taking did not amount to larceny, because the note was really lost, and there was no mark on it, nor other circumstance to indicate then who was the owner, or that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note as proved, that he believed the owner could not be found, and therefore the original taking was not felonious; and if the prisoner had changed the note, or otherwise disposed of it before notice of the title of the real owner, he clearly would not have been punishable, but after the prisoner was in possession of the note the owner became known to him, and he then appropriated it *animo furandi*, and the point to be decided is whether that was a felony.

“Upon this question we have felt considerable doubt. If

he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership it would not have been larceny, nor would it, we think, if he had done so knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is, does that make a difference? We think not, it was dispunishable as we have already decided, and though the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner, and the subsequent conversion was not therefore a trespass in this case, more than the others, and consequently no larceny. We, therefore, think the conviction was wrong."

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CORAM

WILDE, C. J.,
ROLFE, B.,

WIGHTMAN, J.,
CRESSWELL, J.,

PLATT, B.

IN THE EXCHEQUER CHAMBER.

THE QUEEN *against* JOHN MARTIN.

1849.
Monday,
April 30.

VENUE.

Where a prisoner has been convicted, and a question of law reserved, this Court will hear Counsel for the prosecution, although no one appears for the prisoner.

The words of the Stat. 11 & 12 Vict. c. 78, s. 1, "Question of law which may arise in criminal trials" include a question upon the validity of the indictment raised after verdict, and in arrest of judgment.

Words in one count referring to another count include so much only of the other count as is specially referred to; and, therefore, where a person was indicted in the seventh count of an indictment for receiving in the county of Somerset one wether sheep ("*being the same as is mentioned in the fifth count of this indictment*") in which fifth count the said wether sheep was alleged to have been stolen in the county of Dorset; the fifth count is not so incorporated with the seventh as to show jurisdiction to try in the county of Dorset.

Nor will the Stat. 11 & 12 Vict. c. 46 (which provides that accessories after the fact may be tried by any court having jurisdiction to try the principal felon) assist; the seventh count, neither in itself, nor by reference, averring who was the principal to whom the prisoner was accessory.

"At the General Quarter Sessions of the Peace of our Sovereign Lady the Queen, held for the county of Dorset, at Dorchester in the said county, on Tuesday the second day of January, 1849, upon the trial of the indictment hereunto annexed, the prisoners George Eades and Charles Eades were convicted on the fifth count of the indictment, and the prisoner John Martin on the seventh count of the said indictment. It was objected in arrest of judgment on behalf of the prisoner Martin, that the seventh count on which he was convicted was bad on the face thereof.

"1st. For total want of venue.

"2nd. Or for wrong venue.

"3rd. Or for venue so deficient and imperfect as not to be cured by statute.

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“ 4th. That the defect is not to be cured by reference to the venue in the margin.

“ 5th. Or by reference to any other venue in the indictment.

“ 6th. Or by the parenthesis in such seventh count.

“ 7th. That the property is insufficiently laid and described in such seventh count.

“ 8th. That such insufficient description is not to be cured by the parenthesis aforesaid.

“ 9th. That it in no way appeared in the said seventh count that the property the prisoner was charged with receiving was stolen in the county of Dorset so as to give the court jurisdiction.

“ 10th, and generally. That as such seventh count is a distinct and separate charge of substantive felony in its terms of which the prisoner (Martin) might be convicted although an acquittal of the principals had taken place, it must be taken *per se* as if it had constituted the whole indictment, and if bad cannot be cured *aliunde*.

“ The points having been argued the Court overruled the objections, considering the defects cured by the provisions of 7 & 8 Geo. IV. c. 29, s. 56, and 11 & 12 Vict. c. 46, s. 2, and for other reasons, and passed sentence upon the prisoner, but respited the execution of judgment until the opinion of Her Majesty's judges shall have been received upon the case.

“ CHARLES PORCHER,

“ Presiding Chairman.

“ ‘Dorsetshire’ to wit. The jurors for our Sovereign Lady the Queen, upon their oath, present that John Martin, late of the parish of Trent, in the county of Somerset, labourer; George Eades, late of the same parish, labourer; and Charles Eades, late of the same parish, labourer, on the 18th day of December, in the 12th year of the reign of our Sovereign Lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, with force and arms at the parish of Sherborne, in the

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county of Dorset, one wether sheep of the price of twenty shillings, of the cattle goods and chattels of one Henry Ensor, then and there feloniously did steal, take, and drive away, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity."

"2nd count charged, 'That John Martin, George Eades, and Charles Eades, on, &c. at, &c. [as before] one wether sheep, &c. [as before] did kill, with a felonious intent to steal. &c. the carcase, &c.' (a).

"3rd count. 'That John Martin, George Eades, and Charles Eades, on, &c. at, &c. [as before] one wether sheep, &c. [as before] before then feloniously stolen, &c. did receive and have, &c.'

"4th count. 'That John Martin, George Eades, and Charles Eades, on, &c. at, &c. [as before] the carcase of a certain sheep, &c. before then feloniously stolen, &c. did receive and have, &c.'

"5th count. 'And the jurors aforesaid, upon their oath aforesaid, do further present that the said George Eades and Charles Eades, on the said 18th day of December in the twelfth year of the reign aforesaid, with force and arms at the parish of Sherborne aforesaid, in the county of Dorset aforesaid, one wether sheep of the price of twenty shillings, of the cattle goods and chattels of the said Henry Ensor, then and there feloniously did steal, take, and carry away against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.'

"6th count charged, 'That George Eades and Charles Eades, on, &c. at, &c. [as before] one wether sheep, &c. [as before] did kill with a felonious intent to steal the carcase, &c.'

"7th count. 'And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Martin on the said 18th day of December in the 12th year of the reign aforesaid, with force and arms in the parish of Trent, in the county of Somerset, one wether sheep of the price of twenty shillings (being the same property as is mentioned in the fifth count of this indictment) of the cattle goods and chattels of the said Henry Ensor, before then feloniously stolen, taken and carried way, feloniously did receive and have, he the said John Martin then and there well knowing the said cattle goods and chattels last aforesaid to have been feloniously taken and carried away, against the forms of the statutes in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.'

"8th count charged, 'That John Martin, in, &c. at, &c. [as in the seventh count] the carcase of a certain sheep, &c. (being the same, &c. [as in the seventh count]) before then feloniously stolen, &c. did receive and have, &c.' "

Ffooks, on behalf of the prosecution, was proceeding to address the Court. [*Wilde*, C. J.—Does any one appear for the prisoner?] No one. [*Wilde*, C. J.—Has any case

(a) It appears unnecessary to set out at length any of the counts, except the first, fifth, and seventh.

been heard in this Court in which no one has appeared on behalf of the prisoner?] *Reg. v. Masters (a)*.

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WILDE, C. J.—You are entitled to be heard.

Ffooks.—The question here is, whether there was a sufficient venue; and the objection raised is, that in the seventh count no allusion is made to the county of Dorset, in which the trial took place. This objection should have been taken during the trial. It not having been then taken, but after the trial, and after verdict, and in arrest of judgment, this Court has no jurisdiction. [*Rolfe*, B.—Does this not arise upon the trial? *Platt*, B.—The judgment might have been arrested in that Court, and the case reserved.]

WILDE, C. J.—You may proceed.

Ffooks.—The principals in the felony were convicted upon the fifth count of the indictment of stealing a sheep at Sherbourne, in the county of Dorset; and on the seventh count the prisoner Martin was found guilty of receiving the same sheep knowing it to have been stolen. The reference in the seventh count to the fifth count is, “being the same property as is mentioned in the fifth count of this indictment.” [*Wilde*, C. J.—Words of reference do not include the whole count, but merely the particular words referred to.] By the stat. 11 & 12 Vict. c. 46, s. 2, it is enacted, “that if any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute or statutes, he may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted,” &c.; “and the offence of such person, howsoever indicted, may be

(a) 18 Law J., N. S., M. C. 2; *ante*, p. 1, S. C.

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inquired of, tried, determined, and punished by any Court which shall have jurisdiction to try the principal felon in the same manner as if the act, by reason of which such person shall have become an accessory, had been committed at the same place as the principal felony ;” and by s. 3, it is provided, that the same person might be indicted in the same indictment with stealing and receiving the same property. [*Wilde*, C. J.—You must show that the Court had jurisdiction either at common law or by statute. The count does not state any offence committed within the county of Dorset, therefore there is no common-law jurisdiction. By statute (a) the prisoner may be tried in any county in which he shall have had the property in his possession ; the count does not show that the prisoner ever had possession in the county of Dorset. Also where the principal thief might be tried (b) ; it does not appear by this count that the principal thief might be tried in the county of Dorset.] It does appear, if by force of the words of reference the fifth count may be incorporated ; and by the statute the jurisdiction is extended, so that he might be tried where the principal was tried. [*Cresswell*, J.—But who is the principal ? Does the count show to whom the prisoner is an accessory ? or, is there anything in it to show who was the principal ? *Wilde*, C. J.—Your argument is, that because the principal might be tried in the county of Dorset, the accessory also might be tried there ; but there is no averment that the principal might be tried in that county.] In *Reg v. Goff* (c), the offence was committed in the town and county of Southampton, the indictment was preferred and found by the grand jury of Hants, and the party was tried and convicted in the county of Hants,

(a) See 7 & 8 Geo. IV. c. 29, s. 76.

(b) See 11 & 12 Vict. c. 46, s. 2.

(c) 1 Russ. & Ry. 179 ; (see *Rex v. Mullin*, *id.* 144).

under the stat. 38 Geo. III. c. 52 (a); and there the objection was taken that the indictment contained no allegation that the county of Hants was the next adjoining county to the town and county of Southampton; and the Judges held that it was unnecessary, because when the record was drawn up it might appear in the caption. In this case the caption does not appear. [*Wightman*, J.—Suppose the seventh count the only count in the indictment, and to be filled up as the words of reference would fill it up, is that sufficient? He is then charged with receiving in the county of Somerset. It does not appear where was the place at which the principal felon committed the offence.] Such an averment is not necessary. In *Rex v. Goff* the indictment was “County of Hants, to wit. The jurors,” &c., “present,” &c. “That S. G., late of the parish of Holy Rood, in the town and county of Southampton and county of the same town, in,” &c., “at the parish of Holy Rood aforesaid, in the town and county aforesaid, in and upon,” &c.; and it was held sufficient. By 11 Geo. IV. & 1 Will. IV. c. 66, s. 24, the provisions of which section are similar to those of the present statute, (the 11 & 12 Vict. c. 46, s. 2,) jurisdiction is given to try persons for forgery in any county in which they may be in custody, and under that statute it was held by *Patteson*, J., in *Rex v. James* (b), that it was sufficient to show that the party was in custody within the county, and that it was not necessary to aver it in the

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(a) By which it is enacted, “That it shall and may be lawful for any prosecutor or prosecutors to prefer his, her, or their bill or bills of indictment, for any offence or offences committed within the county of any city or town corporate, to the jury of the county next adjoining to the county of such city or town corporate, sworn and charged to inquire for the king for the body of such adjoining county, at any sessions of oyer and terminer or general gaol delivery; and that every such bill of indictment found to be a true bill by such jury shall be valid and effectual in law as if the same had been found to be a true bill by any jury sworn and charged to inquire for the king for the body of the county of such city or town corporate.”

(b) 7 C. & P. 553.

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indictment. [*Wightman*, J.—Is there any provision in the statute of Victoria (*a*), that the accessory may be tried in any county where he may happen to be in custody?] No; where the principal may be tried. [*Wightman*, J.—But that is not shown.] The fifth count states the offence to have been committed in the county of Dorset. Here it would have been sufficient if the statement had been the same as in the fifth count, but it would have been a mere legal fiction. It is not always material that it should appear that the offence was committed within the county, for by 7 Geo. IV. c. 64, s. 12, where an offence has been committed within 500 yards of the border of a county the prisoner may be tried in such county, or in the county in which the offence was committed. In *Reg. v. Mitchell* (*b*), Lord Denman in reference to that statute observed, “It occurs to me as rather doubtful whether the twelfth section of 7 Geo. IV. c. 64, was intended to make any alteration in the law as to venue, it merely extended the boundary of the county 500 yards.” So if this act were done within 500 yards of the county of Dorset, although really in the county of Somerset, it might be laid to be in Dorset. In *Reg. v. Loader* (*c*), tried at *Dorset*, the indictment charged the offence to have been committed in a detached portion of *Somersetshire* surrounded by the *county of Dorset*, and Rolfe, B., held this to be sufficient (*d*). *Reg. v. Fra-*

(*a*) 11 & 12 Vict. c. 46.

(*b*) 2 Q. B. 642.

(*c*) Dic. Q. S. 188, n., 5th ed.

(*d*) By 2 & 3 Vict. c. 82, s. 1, “It shall be lawful for any justice or justices of the peace, acting for any county, to act as a justice or justices of the peace in all things whatsoever concerning or in anywise relating to any detached part of any county which is surrounded in whole or in part by the county for which such justice or justices acts or act; and that all acts of such justice or justices of the peace, and of any constable or other officer in obedience thereto, shall be as good, and all offenders in such detached part may be committed for trial, tried, convicted, and sentenced; and judgment and execution may be had upon them in like manner as if such detached part were to

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er (a), was certainly an adverse decision, but that case might be considered as an exception. He then submitted that the objection to the indictment should have been taken at the trial, and that the defect was cured after verdict by 7 Geo. IV. c. 64, s. 20 (b). He was aware that he must show that the Court below had jurisdiction before the question could arise under that statute; that had been already decided in *Reg. v. O'Connor* (c). He however submitted that this Court would be of opinion that the Court below had jurisdiction. A decision in favour of the Crown would not operate as any hardship upon the prisoner, for he could not be indicted again. [*Rolfe*, B.—How so?] The statute provides “that no person who shall be once duly tried for any such offence, whether as an accessory after the fact or for a substantive felony, shall be liable to be again indicted or tried for the same offence.” [*Rolfe*, B.—That is so, if he can show he has been duly tried.]

WILDE, C. J.—It does not appear to me that there is any reasonable doubt that this count cannot be supported. It is necessary that the count should show a jurisdiction upon the face of it. It does not suffice that certain facts appear *aliunde*. All the circumstances which give the jurisdiction should be incorporated in the indictment. In *Reg. v. James*, which was a case of forgery tried at Gloucester, the indictment on the face of it showed clearly jurisdiction,

all intents and purposes part of the county for which such justice or justices acts or act.”

In *Reg. v. Loader* it was objected that the statute did not give any power to indict, or to a grand jury to inquire of an indictment; and the 7 Geo. IV. c. 64, s. 12, and 4 & 5 Will. IV. c. 36, s. 2, were cited as instances of enactments *in pari materia*. *Rolfe*, B., overruled the objection; but *quære* by the learned Editor of Dic. Q. 8.

(a) 1 M. C. C. 407.

(b) That no judgment, &c. shall be stayed or reversed for want of a proper or perfect venue when the Court shall appear by the indictment to have had jurisdiction over the offence.

(c) 5 Q. B. 16.

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but the evidence did not show that the forgery was committed in Gloucester; the statute, however, says that the party may be tried where he shall be in custody, the same as if the offence had been committed there: in that case the count was supported by force of the statute. In the present case, the prisoner was tried in the county of Dorset, and the indictment charges that he had done the act in the county of Somerset, and the statutes will not assist, because it does not appear who was the thief, where the property had been stolen, or where the prisoner had ever had it in his possession. We cannot enter into any facts which took place at the trial; we know nothing of them beyond what is submitted to us. Here it appears the prisoner was tried in Dorsetshire, whereas he should have been tried in Somersetshire, how can we give judgment against the prisoner in such a case—we cannot. The count upon the face of it gives no jurisdiction, and therefore cannot be supported.

ROLFE, B.—I am of the same opinion. As to whether this Court has any jurisdiction in a case like this, on the ground that it is a matter not arising upon the trial but after the trial, I think the word “trial” in the first section must be taken in a liberal sense, and to mean anything which occurs during the trial in the Court below. I take it to be so from the words of the second section, that “the said justices and barons shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon to reverse, affirm, or amend any judgment which shall have been given,” &c. As to the case (a) tried before me, it does not appear to affect the present question.

WIGHTMAN and CRESSWELL, JJ., and PLATT, B., concurred.

Conviction reversed.

(a) *Reg. v. Loader*, Dic. Q. S. 188, 5th ed.

CORAM

WILDE, C. J.,
ALDERSON, B.

WIGHTMAN, J.
CRESSWELL, J.

PLATT, B.

THE QUEEN *against* JOHN BEETON.

PLEADING.

1849.

Monday,
April 30.

“JOHN BEETON was charged at the General Quarter Sessions of the Peace for the County of Suffolk, held by adjournment at Bury Saint Edmonds, on the 17th day of March, in the year of our Lord one thousand eight hundred and forty-nine, upon an indictment a copy of which is annexed to this case.

“The prisoner pleaded not guilty. After the prisoner had pleaded, and before the counsel for the prosecution had opened his case, the counsel for the prisoner objected that, under the 3rd section of the statute 11 & 12 Vict. c. 46 (a), it was made lawful to add one count only for receiv-

In charging in the same indictment, under the statute 11 & 12 Vict., c. 46, s. 3, a receiving together with a stealing, the prosecution is not limited to one count for receiving.

(a) 11 & 12 Vict. c. 46, s. 3. “And whereas, according to the present practice of courts of criminal jurisdiction, it is not permitted in an indictment for stealing property to add a count for receiving the same property knowing it to have been stolen, or in an indictment for receiving stolen property, knowing it to have been stolen, to add a count for stealing the same property, and justice is hereby often defeated. Be it therefore enacted, that from and after the passing of this Act, in every indictment for feloniously stealing property, it shall be lawful to add a count for feloniously receiving the same property, knowing it to have been stolen; and in any indictment for feloniously receiving property knowing it to have been stolen, it shall be lawful to add a count for feloniously stealing the same property: and where any such indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election; but it shall be lawful for the jury who shall try the same to find a verdict of guilty, either of stealing the property or of receiving it knowing it to have been stolen. And if such indictment shall have been preferred and found against two or more persons, it shall be lawful

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ing, and that the counsel for the prosecution therefore should be called upon to elect upon which of the counts for receiving he would proceed. The Court thought that, under the said section, it was made lawful to add as many counts for receiving as there were counts charging a stealing, and refused on that account to put the counsel for the prosecution to his election ; but, upon the application of the counsel for the prisoner, reserved a case upon that point for the consideration of the Judges of the Superior Courts. The prisoner was found guilty on the eleventh count of the indictment, and acquitted upon the other counts. He was sentenced to seven years' transportation, but execution of this judgment has been respited, until the question reserved by this case shall have been considered and decided.

“ SAMUEL H. ALDERSON,
“ Chairman.

“ Suffolk, to wit. The Jurors for our Sovereign Lady the Queen, upon their oath, present that John Beeton, late of the parish of Hawkedon, in the county of Suffolk, labourer, on the 28th day of January, in the year of our Lord one thousand eight hundred and forty-nine, with force and arms, at the parish aforesaid, in the county aforesaid, the dwelling-house of John Mason there situate feloniously did break and enter, and twenty-six pieces of the current gold coin of the realm, called sovereigns, of the value of twenty six pounds ; two pieces of the like gold coin called half-sovereigns, of the value of one pound ; and one piece of the current silver coin of the realm called a sixpence, of the value of sixpence ; of the proper moneys, goods, and chattels of George Mason, in the said dwelling-house, then and there being found then and there in the said dwelling-house, feloniously did steal, take, and carry away, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

“ The 2nd count in this indictment is the same as the first ; but states the larceny to have been of certain moneys, the property of the said John Mason, in the said dwelling-house.

for the jury who shall try the same to find all or any of the said persons guilty, either of stealing the property or of receiving it knowing it to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving it, knowing it to have been stolen.”

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"The 3rd count is the same as the first; but states the larceny to have been of certain moneys, the property of Joseph Mason, in the said dwelling-house.

"The 4th count is the same as the first; but states the larceny to have been of certain moneys, the property of Elizabeth Mason, in the said dwelling-house.

"The 5th count is the same as the first; but states the larceny to have been of certain moneys, the property of Daniel Mason, in the said dwelling-house.

"The 6th, 7th, 8th, 9th, and 10th counts in this indictment are the same as the first five counts; but stating the breaking to have been into a certain building of the said John Mason, within the curtilage of the said dwelling-house, and stealing the moneys as mentioned in the first five counts respectively.

"The 11th count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that before and at the time of the committing of the offence by the said John Beeton, in this count mentioned, the goods and chattels in the said first count mentioned had been feloniously stolen, taken, and carried away; and that the said John Beeton afterwards, to wit, on the same day and in the year aforesaid, with force and arms, at the parish aforesaid, and within the county aforesaid, the same goods and chattels (*a*) then being of such value respectively as in the first count mentioned, and then being the goods and chattels of the said George Mason, as in that count also mentioned, feloniously did receive and have, he the said John Beeton, at the time he so received and had the same goods and chattels then and there, well knowing the same to have been feloniously stolen, taken, and carried away as in this count before mentioned, against the peace of our said Lady the Queen, her crown and dignity, and against the form of the statute in such case made and provided.

"The 12th, 13th, 14th, and 15th counts in this indictment are the same as the eleventh count; but laying the receiving of the several moneys, as mentioned in the second, third, fourth, and fifth counts of this indictment respectively.

"The 16th count in this indictment charges the prisoner with having been previously convicted of felony."

Bulwer, who appeared for the prisoner, was stopped by

ALDERSON, B.—Is there any doubt about this case? Why may there not be as many counts for receiving as for stealing, without the prosecution being called upon to elect? It is only one offence, laying the property in different persons. There is nothing in the objection.

WILDE, C. J.—We are all of the same opinion.

WIGHTMAN and CRESSWELL, JJ., and PLATT, B. concurred.

Conviction affirmed.

(*a*) See *Reg. v. Radley*, *infra*.

TRINITY TERM,
IN
THE TWELFTH YEAR OF THE REIGN OF VICTORIA.

CORAM

DENMAN, LORD, C. J., PATTESON, J.,
PARKE, B., COLTMAN, J.,
WILLIAMS, J.

THE QUEEN *v.* JOHN MATTOCKS CHAPMAN.

Case stated by the Right Honourable Lord Denman, C. J.

1849.

*Saturday,
June 2.*

PERJURY.

A. swore falsely before a surrogate and thereby obtained a license for the marriage of B. and C., which license was not acted upon; held, that A. was guilty of a misdemeanor.
Qy.—Was he guilty of perjury? (a).

“THE prisoner was tried before me at the last Spring Assizes for Taunton, upon an indictment for perjury, which stated in the

“1st count. That William James, clerk, was a surrogate for the diocese of Bath and Wells, having authority to grant licenses for marriages therein, and that one John Mattocks Chapman, of the city of Wells aforesaid, in the county aforesaid, applied to the said surrogate to grant a license for the solemnization of a marriage at Wilton, between Joseph Baker and Sarah Fry; and that said Chapman unlawfully intending to deceive said James as such surrogate, and to obtain from him such license, *in fraud and violation of provisions*

(a) This point the Court did not decide: it being however an open question, we have inserted the argument, thinking it would be useful to the profession. But see the 6 & 7 Will. IV. c. 85, s. 38, which enacts that every person who shall knowingly and wilfully make any false declaration, or sign any false notice or certificate required by this Act, for the purpose of procuring any marriage, shall suffer the penalties of perjury. See note to *Rex v. Verist*, 3 Camp. 435; Haw. P. C., Index, Perjury.

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of 4 Geo. IV. did, for the purpose of obtaining from said surrogate such license, wilfully, fraudulently, and unlawfully produce before said James an affidavit in writing; and before said surrogate, in due form of law, has sworn and took his oath upon the Gospel concerning the truth of the matters therein, (the said James having lawful and competent authority as such surrogate to administer said oath to said Chapman, in that behalf); and that said Chapman, being so sworn before said James having such authority as aforesaid, did, for the purpose of obtaining such license for the marriage of the said Baker with the said Fry, falsely, corruptly, knowingly, wilfully, fraudulently, and unlawfully, in and by the said affidavit, depose and swear (*inter alia*) in substance and to the effect following, (that is to say): That the name of him, Chapman, was Joseph Baker, and that he was one of the parties for whose marriage a license was applied for; that he was a yeoman and a widower; and that said Sarah Fry had had her usual place of abode in said parish of Wilton for fifteen days then last. Whereas name was not Baker, he was not one of the parties for whose marriage a license was obtained, not a yeoman, not a widower; Sarah Fry had not her usual place of abode in said parish for fifteen days then last; all of which premises were to said Chapman well known. By means of which said false oath, so falsely, &c., taken as aforesaid, said Chapman did unlawfully obtain from said surrogate a license for the solemnization of a marriage at the parish of Wilton, in said county and diocese, between said Baker and Fry; the said James at the time believing the said oath to be true.

“ 2nd count. Similar to first, except that it lays the intent as unlawfully intending to deceive James as such surrogate, and fraudulently to obtain from him such license; and then goes on to state that Chapman, for the purpose of obtaining from said surrogate as aforesaid (query, such license), in due form of law was sworn, and took his oath upon the Gospel; and that Chapman, being so sworn before said James (said James having a lawful and competent power and authority, as such surrogate, to administer said oath), did for the purpose [as in first count] falsely, &c., swear, (*inter alia*) [the rest of the count same as first].

“ 3rd count. Lays the intent as unlawfully intending to obtain from said James, as such surrogate, such license, in fraud and violation of 4 Geo. IV., [the rest same as second count] except that it does not state the oath to be by affidavit.

“ 4th count. The same as the third, except that it states that Chapman, being sworn before said James (having a lawful and competent jurisdiction and authority as such surrogate, to administer the said oath) did, &c.; but it does not state that the license was obtained.

“ 5th count. That James was a surrogate, having authority to grant licenses; that Chapman applied (as in the first count); that Chapman, for the purpose of obtaining from James, as such surrogate, such license, then and there before said James, as such surrogate, in due form of law was sworn, and took his oath upon the Gospel; that Chapman, being so sworn before said James (James having lawful and competent power and authority, as such surrogate, to administer such oath), did, upon his oath aforesaid falsely, corruptly, knowingly, wilfully, and maliciously, before the said James, swear (*inter alia*)

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in substance and to the effect following, (that is to say,) as in the previous counts ; and so that said Chapman, before said surrogate (said James having such authority), by his own act, &c., and of his own wicked and corrupt mind, &c., falsely, &c., did commit, wilful and corrupt perjury, &c.

“It was proved that the prisoner went before Mr. James, a surrogate for the diocese of Bath and Wells, to obtain a license ; that the several facts stated and recited in the affidavit set out below were then taken down from the dictation of the prisoner, and the affidavit signed by him ; that an oath was then administered to him in the presence of Mr. James, and he was asked if his name was Joseph Baker, and if the signature was his, to which he said ‘Yes ;’ that the affidavit was then read to him, and he was asked if the contents of it were true, to which he said ‘They were ;’ that the said several facts were false, to the knowledge of the prisoner, at the time he so dictated them ; that Mr. James then gave him the license mentioned in the indictment.

“The following is a copy of the affidavit above referred to :—

“Diocese of Bath and Wells.

2s. 6d.
Stamp.

On the 27th day of July, 1848, appeared personally, Joseph Baker, of the parish of Bishops Hull, in the county of Somerset, yeoman, a widower, and prayed a license for the solemnization of matrimony in the parish church of Wilton, in the county aforesaid, and diocese of Bath and Wells, between him and Sarah Fry, of the parish of Wilton aforesaid, spinster, of the age of 21 years and upwards, and made oath that he believeth that there is no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony according to the tenor of such license. And he further made oath that she hath had her usual place of abode within the parish of Wilton aforesaid for the space of fifteen days last past.

“JOSEPH BAKER.

“Sworn on the same day, before me,

“W. JAMES,

“Surrogate.

“ At the close of the case for the prosecution the counsel for the prisoner objected that the allegations of the indictment were not sustained by the evidence.

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“ 1st. That the instrument was not in form an affidavit, as it used the words ‘made oath,’ instead of ‘maketh oath.’

“ 2nd. That the names, residence, &c., in the affidavit mentioned, were mere description and not assertion. *Balfour v. Carpenter*, 1 Phill. 204.

“ 3rd. That the surrogate had not competent authority to administer the oath to the prisoner.

“ 4th. That the indictment disclosed no offence known to the law.

“ The prisoner was found guilty. I request the opinion of the learned Judges upon this case.

“ DENMAN.”

Phinn, for the prisoner.—First, the indictment, framed as it was, was not sustained by the evidence. The allegation, running through all the forms of the indictment, “that the surrogate had power to administer the oath,” was not proved. The first four counts show no offence known to the law. As to the fifth count, the surrogate had no power to administer this oath to this person: this is the most material point. It is not perjury, and punishable as perjury, to make a false statement before a surrogate, in order to obtain a marriage license. First, that the first four counts disclose no offence in law, even construing the indictment most unfavourably to the prisoner. The first question is, Whether this instrument be in fact an affidavit; whether the prisoner, by subscribing it, made the oath alleged in the indictment? Whether it be charged that he made oath, or that he made an affidavit, will make no difference on this point. The affidavit, instead of using the present tense, “*maketh* oath and

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saith," was "*made* oath and saith," thereby rendering the instrument a mere memorandum. *Howorth v. Hubbersty* (a) is an authority to show that an affidavit in this form is not sufficient in our Courts. It was unnecessary to argue this point. The real difficulties in the case are these:—Ever since the time of Lord Holt it has been a moot point, whether perjury can be assigned upon statements made in the Ecclesiastical Courts; and Lord Holt thought it doubtful whether perjury could be assigned upon matters there of a contentious jurisdiction (b). The granting of licenses is what is called the voluntary jurisdiction of the Ecclesiastical Courts. Some account of licenses, and the authorities bearing upon them, are to be found in Gibson's Codex (c). At the time of the Council of Trent, it was not necessary in the Romish Church that marriages should be solemnized *in facie Ecclesiæ*; but as early as the Third Council of Lateran (d) it was provided, that banns should be published when people wished to solemnize matrimony in the face of the Church: "Statuimus ut cum matrimonia fuerint contrahenda in Ecclesiis per Presbyteros publicè proponantur, competenti termino præfinito; ut infra illum, qui voluerit et valuerit, legitimum impedimentum opponat, et ipsi Presbyteri nihilominus investigent, utrum aliquod impedimentum obsistat" (e). It was, however, frequently found necessary to grant dispensations from the rigour of that state. Gibson cites several instances (f); amongst others in the case of people of state

(a) 3 Dowl. 455.

(b) In *Bishop of St. David's v. Lucy*, 1 Ld. Raym. 451.

(c) "License," p. 510, &c.

(d) Council of Lateran, the Third; Innocent III. A.D. 1216. Before the time of Pope Innocent the Third there was no solemnization of marriage in the church but the man came to the house where the woman inhabited, and led her home to his own house, which was all the ceremony then used. [Dic. "Marriage," 1 Rol. Abr. 359]; 1 Sid. 64.

(e) See also, *Corpus Juris Canonici*, lib. 4, p. 207.

(f) Gib. Cod., "License," p. 515.

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and condition, with certain conditions annexed. These conditions are also mentioned in Strype's Life of Whitgift (*a*). The pope had the power of granting licenses in some districts; in others, the bishops. By stat. 25 Hen. VIII. c. 21, ss. 4, 5, the power is given to archbishops. Up to the time of the Reformation, and for some time afterwards, no oath was required for a person to obtain a license. Whitgift (*b*) mentions the conditions upon which the licenses were afterwards to be granted, and amongst them he does not mention the oath. Thus the matter stood until the Canons of 1603: these canons, not having been sanctioned by Act of Parliament, are not binding upon the laity, and they only become so when incorporated in an Act of Parliament. The 102nd canon of 1603 contained certain conditions under which licenses might be granted, and amongst others certain securities, which are to be taken for the condition of the parties, and the manner of celebrating the matrimony: and the 103rd canon for the first time imposed the oath upon one of the parties personally, that he believed there existed none of the impediments therein mentioned in bar of the matrimony according to the tenour of the license. Thus, in 1603, it was settled that a bond was to be given and an oath made, to impose additional security. In passing, Lord Hardwicke's Act (*c*) does not affect this question at all. The stat. 3 Geo. IV. c. 75, is material; by s. 9, an oath was required to be made by one of the parties for whose marriage such license was sought; and by s. 10, such oath was to be taken before the surrogate: and it then provides, that if any person in any oath to be made and taken in pursuance of the Act, for the purpose of obtaining such license, shall knowingly and wilfully swear that which is untrue, he shall, on conviction, be deemed guilty of perjury. This section

(*a*) See Vol. III. p. 380; Vol. II. p. 380.(*b*) *Ibid.*(*c*) 26 Geo. II. c. 33.

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however, together with the whole of the Act, from s. 8 to s. 26, was repealed by 4 Geo. IV. c. 17. We then come to the 14th section of 4 Geo. IV. c. 76, which is the material section in the present case. That section provides, "That before any such license be granted, *one of the parties* shall personally swear before the surrogate, or other person having authority to grant the same, that he or she believeth that there is no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced in any Ecclesiastical Court, to bar or hinder the proceedings of the said matrimony according to the tenor of the said license; and that one of the said parties hath, for the space of fifteen days immediately preceding such license, had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnized," &c. That section incorporates the Canons of 1603, and adopts the rule of the Ecclesiastical Courts into the common law; but there is no section through that Act analogous to the provision of stat. 3 Geo. IV. c. 75, s. 10, making it perjury to take a false oath before a surrogate. The 21st section of 4 Geo. IV. c. 76, provides, that persons unduly solemnizing marriage in the manner pointed out by that statute shall be guilty of felony, and that is the only penal section in the Act, except the 23rd, which provides, that when any marriage shall be solemnized between parties under age contrary to that Act, by false oath or fraud, the guilty party shall forfeit all property accruing from the marriage. The statute law, therefore, stands thus: the surrogate has the power to administer the oath, but there is no provision that the taking a false oath shall be perjury. If, indeed, the court of the surrogate were made a court of record, then the taking a false oath before him in such case would be perjury. In this case, the person who took the oath was not the person for whom the license was obtained, although he said that he was. Having called attention to

the statutes upon the subject, he would now refer to the authorities, and it would be found that, from the time of Lord Holt, this has been *verata questio*. In *The Bishop of St. David's v. Lucy* (a) it is said by the Court, whether by Lord Holt does not appear (b), “In case of perjury, if it be committed in a cause of which the Spiritual Court has conusance, as matrimony, &c., they shall proceed in the Spiritual Court to punish it; otherwise, when it is committed in matter of contracts, &c. :” and Lord Holt then says, “It has been a question whether perjury in the Spiritual Court can be tried here, and in all the cases where it has been the persons have been acquitted, and so it has been ended; but it is not yet settled.” The next case in which the matter was mooted is *Rex v. Alexander* (c); there the question was, Whether a false oath taken in Doctors’ Commons, for the purpose of obtaining a marriage license, was perjury? The jury found the prisoner guilty; but the case was reserved for the opinion of the TWELVE JUDGES. The question was agitated several times; but, the prisoner dying in Newgate, the result of their Lordships’ deliberations was never publicly communicated. The same point again occurred in *Woodman’s* case (d); but in this case also the opinion of their Lordships was never declared. He now came to the authority always referred to in matters of this kind, but which, from no reason having been given for the judgment, he feared was no authority in any way; that was the case of *Reg. v. Forster* (e): there it was held that a false oath taken before a surrogate, in order to procure a marriage license, would not support a prosecution for perjury. This case, however, was decided in 1821, before the passing of the

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(a) 1 Lord Raym. 447.

(b) *Per* Gould, J.

(c) 1 Leach, 74, ca. 34, cited also in Russ. on Crimes.

(d) 2 Russ. on Crimes, 598, and note (g).

(e) Russ. & Ry., 459.

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statute 3 Geo. IV. c. 75, by which it was made perjury to take a false oath before a surrogate. This case must have been decided upon one of two grounds; either upon the ground that the surrogate had no power to administer an oath at common law, or that, having the power, the oath was not administered in a judicial proceeding; if the Court decided upon the former ground, the case fails as an authority in consequence of the subsequent statute; but if upon the latter—that the proceeding before a surrogate is a mere ministerial proceeding and not a judicial one—it is an authority in favour of the prisoner. He had not been able to find any authority to show whether granting licenses is a part of the voluntary or the contentious jurisdiction of the surrogate. [*Patteson*, J.—Did you look into *Oughton*(*a*), where he refers to the vicar's jurisdiction? I should have thought you would have met with it there.] He had looked into *Oughton*, and did not find anything about it; but he had an authority in *Sanchez*, to which he would call attention immediately. It was clearly voluntary from this, that the Courts themselves selected the persons to whom the certificates would be granted—it was not to be granted to mean persons, but to persons of rank, “*proceribus et magnatibus*.” In *Sanchez* “*De Matrimoniis*” (*b*), in discussing, “*utrum ad dispensandum in denunciationibus desideretur justa causa, judicialisque ejus cognitio*,” he goes through various reasons on both sides, and then sums them up and draws his own conclusion, in these words:—“*Hinc infertur hanc causæ cognitionem posse fieri ab ordinario sine ordine, et figura judicii et testibus non receptis in forma judicii nec jurantibus. Prob. quia non est judicialis, sed ad informationem conscientiæ ordinarii; in tali autem cognitione non desiderantur testes*

(*a*) “*Ordo Judiciorum*.”

(*b*) *De consensu clandestino*, lib. 3, disp. 8.

jurantes, nec ordo et figura judicii: ut optimè docent;” and then he cites authorities. The distinction between voluntary and contentious jurisdiction is also drawn in book iii. disp. 19. He also referred to Mascardus de Probationis (a). He then submitted the offence did not amount to perjury, inasmuch as it did not take place before any court of law or in any judicial proceeding. In all the statutes subjecting the parties to the penalties of perjury, it is expressly declared, that the oath must be administered ministerially. All the cases are collected by Greaves, in Russ. on Crimes (b). The Ecclesiastical Courts cannot give themselves power by the canons not sanctioned by an Act of Parliament. They must administer the oath to the person about to be married. This was not alleged in the indictment. He mentioned *Rex v. Verelst* (c); it was not however material. He then called attention to the first four counts of the indictment, which charged the prisoner with a misdemeanour. Now what was really the offence charged in those counts? But in the first place he should say those counts were not sustained by the evidence; as to the counts themselves, they show no offence at law. They all charge in one shape or another that the defendant swore that his name was Joseph Baker, that he was one of the parties for whose marriage a license was applied for, and that he was a yeoman and a widower. The fact is, that he never swore anything of the kind; for, upon looking to the affidavits, it would be found to be all matter of description preceding the oath. If anything at all, it was rather an impersonation, for all the former part of the instrument

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(a) Vol. II., conc. 1368, n. 14, 15; Limitatur primo conclusio, ut non procedat quando judex procederet ad informationem suam tantum; quia tunc a testibus etiam non juratis informationem sumere potest, Inno. in c. cum in tua, de sponsal. dicens quod judex potest ad informationem suam procedere sine ordine et figura judicii, et sine testibus in formâ judicii receptis quod dictum referendo sequitur.—*Bald.*

(b) Vol. II. p. 598.

(c) 3 Camp. 432.

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down to the words "twenty-one years," were merely matter of description. For this he had a very high authority in *Ewing v. Wheatley* (a). There the question discussed was whether a license obtained by fraud was void in law, and Sir William Scott, in giving judgment, makes this observation:—"It is perfectly established that no disparity of fortune, or mistake as to the qualities of the person, will impeach the vinculum of marriage; and the *mere description is not a constituent part of the affidavit.*" He also cited *Balfour v. Carpenter* (b). [Lord Denman, C. J.—The case of *Ewing v. Wheatley* is a description of circumstances, and not a description of the person; it is very different from this.] This is not a mere matter of form in the affidavit; it has been done expressly by the Court, because the license is a question *de identitate personæ*: that is established by *Cope v. Burt* (c). [Parke, B.—If you say that a man swears three things, and he swears but one falsely, that one will be sufficient; it is enough that he made a false oath before a surrogate in order to obtain a license, because every step towards a misdemeanour is in itself a misdemeanour, and therefore a false statement, made in order to obtain a license, is a misdemeanour.] That is, supposing it to be a misdemeanour to obtain a license by means of a false oath. [Patteson, J.—This is not the case of a man obtaining the license for himself, but representing another for whom he obtained it.] If it had been so stated in the indictment, I might have been in some greater difficulty upon the authorities. It runs through all the counts, that the surrogate had power to administer the oath to this person. [Lord Denman, C. J.—Is there any doubt that the surrogate had the power? You cannot contend that a deception on the part of the person

(a) 2 Hag. Cons. Rep. 175, 183.

(b) 1 Phill. 204, 221.

(c) 1 Cons. Rep. 434.

who applies will deprive the surrogate of the power.] If the question is discussed abstractedly, he has no power; if you discuss it relatively, he has power. He would now proceed to inquire whether the counts were good in law. [*Patterson, J.*—There is certainly one part false; that is, that the woman had had her usual place of abode in the parish for fifteen days.] But all the counts refer to the oath, and state it as “the said oath.” It is charged that he made certain false statements on oath, and thereby obtained a license; but it does not say that he obtained it with a view to a marriage, or that a marriage was solemnized; nor does it say that he obtained a license in writing: it is consistent with this that he obtained a mere parol license. It is said this indictment will lie because it is a matter of public concernment: it might be so if it stated that the parties were married; but it cannot be where it is confined to the party himself, and never acted upon. These counts are undoubtedly founded upon the suggestion thrown out in *Rex v. Forster*. The question there was, Whether perjury could be assigned on a false oath taken before a surrogate? What the Judges decided in that case it is difficult to discover, because the marginal note differs so much from the case. Russel (a), in referring to that case as an authority, says:—“If the indictment only charges the taking the false oath, without stating that it was for the purpose of procuring a license, or that a license was procured thereby, the party cannot be punishable thereupon as for a misdemeanour.” That certainly makes all the difference, for when the marriage is had, a crime is accomplished; here it is only the means of doing it. The man, up to the time of solemnizing the marriage, has a *locus pœnitentiæ*. He has done that much which would enable him to commit a misdemeanour, but he stops short of the offence itself. If two

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(a) Russel on Crimes, vol. ii. pp. 598, 599.

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persons had been concerned, it would have been a conspiracy. He should be met with the observation that this is a false personation, and that a false personation is a misdemeanour at common-law. It was once an offence to personate bail, which the Court itself could punish; still it was found necessary to pass an Act making it a felony: but it was nevertheless held not to be felony until the bail was filed, but only a misdemeanour; and, in East's P. C. (a), it is said, "In all cases not made felony by statute, the bare fact of personating another, though for the purpose of fraud, can in no instance amount to more than a cheat or misdemeanour at common-law, and be punishable as such." Several cases are there cited in support of this position, but they are all, with the exception of *Dufree's case*, cases of conspiracy: there the indictment charged that he personated one A. B., clerk to H. H., a Justice of the Peace, with intent to extort money from several persons, in order to procure their discharge from certain misdemeanours for which they stood committed; and the Court declined to quash the indictment, but put the defendant to demur. This cannot be treated as an indictment for falsely personating another, for it has not the word personate in it; it has not the *vocabulum artis*, and therefore on that ground cannot be sustained.

Fitzherbert, for the Crown.—There was ample material to support the count for perjury, and also the third count. The words were all taken down from the dictation of the prisoner, and it is perfectly clear from the evidence that he stated all the facts as laid. First, whether the allegation was sustained that the surrogate was able to administer the oath. The statute 4 Geo. IV. c. 76, certainly does not give the authority, nor does it say that the surrogate shall not grant the oath. The

(a) P. 1010.

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surrogate had already the power by the 103rd canon, and the statute 4 Geo. IV. c. 76, does not limit that power; but, on the contrary, requires the surrogate, or other person having authority, to administer the oath to all persons before granting any license. The only question raised in *Rex v. Forster* was, whether a surrogate could administer an oath. [Coltman, J.—How did he acquire the authority to administer an oath?] As an officer of the Ecclesiastical Courts. The Canons of 1603 are always taken, unless the contrary be established, as declarations of the state of the Ecclesiastical Law at the time. That appeared from *Rex v. Verelst*; that is, they are taken as declaratory of the law *primâ facie*, but not exclusively. In the 103rd canon are these words: “And furthermore, that one of the parties personally swear that he believeth there is no lett or impediment of pre-contract, or kindred, or alliance, or of any other lawful cause whatsoever, nor any suit commenced in the Ecclesiastical Court, to bar or hinder the proceeding of the said matrimony according to the tenor of the aforesaid license.” It was a misapprehension to say there is anything in the statute law to limit the power of the surrogate; the reverse was the fact: for by the act for the punishment of perjury, 5 Eliz. c. 9, s. 11, after providing that such Act shall not extend to any Court Ecclesiastical, it enacts that every person so offending “shall and may be punished by such usual and ordinary laws, as heretofore hath been and yet is used and frequented in the said Ecclesiastical Courts.” [Parke, B.—How do you get over the case of *Rex v. Forster*?] He would submit that case was entirely founded on error. The case was reserved, because the Judge was not aware that any case had been decided that perjury could be assigned upon a false oath taken before a surrogate. The case of *Rex v. Verelst* was not brought under the consideration of the Court. [Parke, B.—That was only an opinion of Lord Ellenborough, which

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ended in an acquittal; this point does not appear to have been raised. *Lord Denman*, C. J.—It is unnecessary to decide whether perjury can be assigned on a false oath taken before a surrogate; there is a clear case on the counts for the misdemeanour, if you will confine yourself to this point, —Whether it is a misdemeanour to take a false oath before a person competent to administer it, before a public officer in his public capacity, and in the performance of a public duty.] *Rex v. Beck* (a) is an authority that an indictment will lie for taking a false oath in order to obtain a marriage license. In *Shaw v. Thompson* (b) it is said that an action might be maintained for the words, “Thou art a forsworn knave, and I will prove thee to be forsworn in the Spiritual Court;” “for the Ecclesiastical Court is a judicial court, and well known;” and that case has never been denied as law. *Plaice v. Howe* (c) shows that it is an offence at law to take a false oath in the Consistory Court. *Rex v. Forster* (d) is an authority also showing it to be an indictable misdemeanour. In Chitty’s Criminal Law (e) is the precedent of an information by the Attorney-General against a person for procuring a marriage by means of false affidavits; and Mr. Chitty, in a note, says, “It seems doubtful whether an indictment for perjury could have been supported in this case, but it seems most probable that it might.” In *Rex v. Mawbey* (f) it is decided, that at common law it is indictable to make a false certificate to mislead the Court; and in *O’Mealy v. Neville* (g) it was held, that a person knowingly using

(a) 2 Stra. 1160.

(b) Cro. Eliz. 609; this case is cited as an authority that perjury will lie for a false oath taken in a Spiritual Court, 2 Roll. 410; 1 Rol. Abr. 40; 16 Vin. Abr. 313; Hawk. P. C. b. 1, c. 69, s. 3; see also *Rex v. Greep*, 5 Mod. 348.

(c) Cro. Eliz. 185; S. C. 1 Leon. 131, *Pierce v. Howe*.

(d) Russ. & Ry. 459.

(e) Vol. III. p. 713.

(f) 6 T. R. 619; see 632, 635, 637.

(g) 8 East, 364.

a false affidavit made in a foreign country, with a view of perverting public justice, is punishable by indictment; that is, supposing it to be a judicial proceeding: but, if it is not so, still it is a matter affecting the public in a manner which ordinary care and skill could not guard against, and as such it is indictable. *Rex v. Wheatley* (a) is to the same effect: and on the same principle, in *Rex v. Osborne* (b) it was held that selling short measure was not indictable, but selling by short measure was; for, as observed by Wilmot, J., the first is in everybody's power to prevent, "whereas a false measure is a general imposition upon the public which cannot be well discovered:" this case was referred to in *Young v. Rex* (c), by Buller, J., as the best test of the principle upon which the Courts had gone. There was also the case of *Rex v. De Beauvoir* (d), in which Lord Denman, in giving judgment, says, "It is a misdemeanour falsely to take an oath, which a party is required by Act of Parliament to take before a magistrate." In *Rex v. Smith* (e), Ashhurst, J., said that there was no sort of doubt that to obstruct the execution of a statute is an offence at common law: he also cited *Rex v. Jones* (f). It had also been objected, that it was not stated that the license to marry was in writing; but it was to be observed that the offence was stated in the very words of the Act of Parliament, which has always been held sufficient, *Walter v. Rumball* (g); and, from *Wilson v. Nightingale* (h), it would appear that where a statute required a written notice to be given, it is sufficient to aver that notice has been given according to the form of the statute, and that it is unnecessary to state

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(a) 2 Barr. 1127.

(c) 3 T. R. 98.

(e) Doug. 445.

(g) 4 Mod. 388; S. C. 1 Ld. Raym. 53.

(h) 8 Q. B. 1034.

(b) 3 Burr. 1697.

(d) 7 C. & P. 17.

(f) 2 B. & Ad. 611.

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upon the face of the instrument that such notice was a written notice ; it is sufficient to prove it.

Phinn, in reply.—All through the indictment it is alleged that the person had authority to administer the oath. It is begging the whole question to say that they had the power *propria vigore*. No oath was administered up to 1603, and then the Ecclesiastical Courts for the first time assumed the power. All the cases cited on the other side are offences against some Court of Law. No doubt, those are offences against the prerogative of the Crown; but there is no case bearing upon the present question. *Rex v. Osborn* is a decision in favour of the defendant; merely to get the license is not indictable; but following it up, by using it, would be. [*Parke*, B.—If a step be taken by an act done towards a misdemeanour, can you get out of the fact that that is in itself a misdemeanour, as when a person attempts to get a seal engraved with intent to defraud the Bank?] In this case it might have been an offence to which the party would have been liable had he been charged with the intent.

LORD DENMAN, C. J.—I feel that I ought to make an apology to the Bench for having reserved this case, and my apology is, that both counsel at the trial thought there was a point; and therefore, if I had undertaken the consideration of the question at the time, it would have materially delayed the assizes. But, if I had looked at the point at the time, I should have felt it to have been my duty to have disposed of it at once, and not to have troubled the Court with a matter upon which there can be no possible doubt. [He here stated the facts.] It is a proceeding, in a public matter of the greatest concernment, before a public officer exercising the power of administering the oath, it is admitted, ever since the year 1603; and by the statute of 4 Geo. IV. c. 76, bound to exercise it. Here the surrogate, in the exercise of that power, is induced to grant

the license upon a statement to which the prisoner makes oath. It is said the Act was not completed; that the marriage was not solemnized, although it is admitted the power for doing so was obtained; but any one unlawful step towards the completion of that which in law would be a misdemeanour, is in itself undoubtedly a misdemeanour. The authority of the surrogate to administer the oath does not depend upon the truth of the applicant's statement. Here a false oath has been taken, and it is clear that this is a misdemeanour.

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PARKE, B.—I agree with my Lord. I think the third count supported. With respect to the affidavit, what appears upon oath is clearly that the woman had resided in the parish for fifteen days, that is clearly perjury; a marriage is a matter of a public nature, and there was an endeavour to obtain it by means of a false oath. The only remaining question is—Whether the third count is good upon the face of it. Whether the charge of taking a false oath for the purpose of procuring a marriage license, without going on to say that the marriage was solemnized, is a misdemeanour. I am of opinion it is sufficient, and therefore the judgment should be for the Crown.

PATTERSON, J.—It is not necessary to determine whether the fifth count be sustainable or not: the only question is, Whether the surrogate had power to administer an oath. He had general power to administer an oath in matters of marriage. The 4 Geo. IV. does not give the power; but it says, “that, before any license is granted, one of the parties shall personally swear before the surrogate, or other person having authority to grant the same,” &c.: it seems by that he has the power. It is said the party to whom the oath was administered was not one of the parties to be married, although he represented himself to be so; so that the party's own fraud is to be taken as a means of defeating the indictment. I think it is sufficient here, that it is stated that he

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went before the surrogate with intent to deceive him, a public officer, and to obtain the certificate from him. Whether he did swear the other matters is immaterial, because it is clear he did swear that the woman resided in the parish. COLTMAN and WILLIAMS, JJ., concurred.

Verdict to be entered on the third count.



THE QUEEN *against* WILLIAM BRISBY.

ORDER IN BASTARDY.

1849.

*Saturday,
June 2.*

“ THIS was an indictment for disobeying an order of justices, dated the sixth day of May, 1848, and was tried at the Epiphany Sussex Sessions at Petworth. The defendant was found guilty, subject to the opinion of the Court, on the following case :—

“ On 1st January, 1848, Sarah Hollist obtained an order of the justices against the defendant, as the putative father of her bastard child. A true copy of that order is hereto annexed, marked with the letter A. (a)

(a) “ A.

“ ‘ Sussex, to wit. At a Petty Session of Her Majesty’s Justices of the Peace for the county of Sussex, holden in and for the division of Lower Arundel, in the said county, at the Town Hall, Petworth, on the first day of January, in the year of our Lord one thousand eight hundred and forty-eight, before us, George Wyndham and John Luttmann Ellis, Esquires, two of Her Majesty’s Justices of the Peace for the said county.

“ ‘ Whereas, one Sarah Hollist, single woman, residing at Duneton, within this division, did, on the 16th day of November, in the year of our Lord one thousand eight hundred and forty-seven, having been delivered of a bastard child within twelve calendar months prior thereto, make application to John Luttmann Ellis, Esq., one of Her Majesty’s Justices of the Peace acting for the division, for a summons to be served upon one William Brisby, of Haslemere, in the county of Surrey, grocer, whom she alleged to be the father of the said child ; and the said Justice thereupon issued his summons to the said William Brisby, to appear at a Petty Session to be holden on this day for this division, in which the said Justice usually sits, to answer her complaint touching the premises.

“ ‘ And whereas the said William Brisby, having been duly served with the said summons, within forty days from the fourth day of December, one thousand eight hundred and forty-seven, from which day the hearing of this case had been adjourned ; and the said Sarah Hollist having now applied to us the Justices in Petty Sessions assembled, for an order upon the said William Brisby, according to the form of the statute in such case made and provided.

Where justices in Petty Session have made an order in bastardy which is bad upon the face of it, and which has been in no way enforced, and the costs actually incurred by the putative father have been tendered to him, such order may be simply abandoned, and a new one made by the same or by other justices.

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“ This order was served upon the defendant, but no payment was made by him under it.

“ On 28th day of April, in the same year, the justices who had made the order of the 1st January made a supersedeas of the same, under their hands and seals. This supersedeas was indorsed on the said order of the 1st January, and was in the following words :—

“ ‘ Whereas it doth now appear unto us, George Wyndham and John Lutterman Ellis, Esqs., the Justices of the Peace above-named, that the order above set forth is by reason of certain errors therein, and omissions therefrom, invalid according to law; and being advised by counsel, that

And it being now proved to us * that the said child was—since the passing of an Act passed in the eighth year of the reign of her present Majesty, intituled “ An Act for the further Amendment of the Laws relating to the Poor in England,” that is to say, on the second day of June, in the year of our Lord eighteen hundred and forty-seven—born a bastard of the body of the said Sarah Hollist; and we, having † heard the evidence of such woman and such other evidence as she hath produced, and the evidence of the said Sarah Hollist, the mother of the said child, having been corroborated in some material particular by other testimony to our satisfaction, do hereby adjudge the said William Brisby to be the putative father of the said bastard child. And, having regard to the circumstances of this case, we do now hereby order that the said William Brisby do pay unto the said Sarah Hollist, the mother of the said bastard child, so long as she shall live and be of sound mind, and shall not be in any gaol or prison, or under sentence of transportation, or to the person who may be appointed to have the custody of such bastard child under the provisions of the said statute, the sum of two shillings per week, from the sixteenth day of November last until the said child shall attain the age of thirteen years, or shall die, or the said Sarah Hollist shall marry. And we do hereby further order the said William Brisby to pay to the said Sarah Hollist the sum of one pound two shillings, being the costs incurred in obtaining this order.

“ ‘ Given under our hands and seals at the sessions aforesaid.

“ ‘ GEORGE WYNDHAM. (L. S.)

“ ‘ J. L. ELLIS. (L. S.)’ ”

* “ In the presence and hearing of the said ———,” which appear in the printed form given by the statute, were erroneously struck out. See 8 & 9 Vict. c. 10, schedule No. 8.

† “ In the presence and hearing of ———,” again struck out.

such order is so invalid, *we do therefore* hereby absolutely and irrevocably supersede, annul, and make void the said order. Given under our hands and seals, this twenty-eighth day of April.

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“ ‘GEORGE WYNDHAM. (L. S.)

“ ‘J. L. ELLIS. (L. S.)’

“ This supersedeas was on the same day served upon the defendant, and a tender was made him, but declined, of a sum sufficient to cover all the costs actually incurred by him, in consequence of the said first order.

“ On the following day, the 29th of April, Sarah Hollist made another complaint, and a fresh summons was thereupon issued against the defendant, requiring him to appear at a Petty Session of the Peace, holden on the 6th day of May, to answer such complaint of the said Sarah Hollist, respecting the same bastard child. The justice who granted the summons was one of the justices who made the said first order and executed the said supersedeas.

“ The defendant protested against the said justices, at such last-mentioned Petty Sessions, having jurisdiction to hear and adjudicate upon the said complaint of the said Sarah Hollist against him, as there had already been a judicial hearing and adjudication by a competent tribunal on the same, and as the said order of the 1st of January, touching the same subject-matter, was still in existence.

“ The justices—one of them being the same Mr. Ellis who had made the former order and supersedeas, and who had issued the last summons—considering that they had jurisdiction, made another order against the defendant respecting the said complaint of the said Sarah Hollist, respecting the said bastard child, which said last-mentioned order is hereunto annexed, marked with the letter B. (a)

(a) It is unnecessary to set this out, no objection having been made to the form of it

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“ This order was duly served upon the defendant, who refused to pay under it.

“ All the facts were admitted upon the trial ; but it was contended, on behalf of the defendant, that the second order was made without jurisdiction, as there had been a previous judicial hearing and adjudication on the same subject-matter, and a previous order made thereon, and which, at the time of the making of the second order, had not been granted on appeal, but was still in existence. It was argued for the prosecution, that as the first order was an invalid one and had been duly superseded, and as a sufficient tender of all costs occasioned by it had been made to the defendant before the summons for the second order was issued, the justices had jurisdiction to make the second order, notwithstanding there had been a former one on the same subject-matter.

“ If the Court should be of this opinion, the verdict of guilty is to stand ; and, if not, the verdict is to be set aside, and one of not guilty entered.

“ T. DOYLE,
“ Chairman.”

Creasy for the defendant.—[*Lord Denman*, C. J.—Does any Act of Parliament give the power to supersede the order ?] No ; the magistrates had no authority for such a proceeding, and therefore when the second order was made the first was in existence. This point had been much discussed in a recent case in the Court of Queen’s Bench, *Reg. v. Hinchliffe (a)*, but was not there decided. He would first call attention to the supersedeas, and he would contend that it was a mere nullity. It was admitted that the first order was bad, inasmuch as it did not allege that the fact was “ proved in the presence and hearing of the

(a) 10 Q. B. 356 ; S. C. 16 L. J., M. C. 78.

defendant" (a). No question arose upon the second order. He would first consider what is a supersedeas, and whether the magistrates had authority to make it. Several instances of supersedeas are to be met with, but they are all cases of commitment; and for this *ex parte* proceeding a supersedeas may be had. But there is no case of a supersedeas in a matter like the present, where the parties have been heard, and the magistrates have given a decision. In orders of removal also instances may be found, but the instrument commonly called an order of removal, is merely a warrant; and if he could show that a supersedeas does not necessarily annul it, it would appear *à fortiori* that an order like the present could not be thereby annulled. [Parke, B.—Could the first order be enforced?] No. [Parke, B.—Then it is a nullity, void on the face of it; and, therefore, why go through any form upon it? Lord Denman, C. J.—I think the Court decided this question upon the last paper day. *J. J. Johnson*, who appeared in support of the second order, said he believed that was so in the case of *Reg. v. Thomas* (b).] The law provides certain modes by which such orders may be got rid of, and these modes must be followed. Here the proper course would have been to remove it by *certiorari*, and then to quash it. All those cases, in which the orders have been got rid of and fresh ones have been made, are cases where there has been a consent between the parties that it should be so; *Rex v. Llanrhydd* (c). [Lord Denman, C. J.—This distinction is constantly kept alive upon orders of removal; the supersedeas is practically nugatory.] It then resolves itself into a question of jurisdiction on this matter. What are the powers given by the statute in making these

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BRISBY.(a) See *Reg. v. Grafton, Duke of*, 17 L. J., M. C., 125.

(b) Not yet reported.

(c) Burr. S. C. 658; see *Reg. v. Townstall*, 3 Q. B. 357; S. C. 12 L. J., M. C., 72.

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bastardy orders? The statute gives the power of making one, and only one, application to the magistrates, and then their jurisdiction is exhausted. It is said, in Paley on Convictions (*a*), “All the justices of each district are equal in authority; but as it would be contrary to the public interest, as well as indecent (*b*), that there should be a contest between different justices, it is agreed, that the jurisdiction in any particular case attaches in the first set of magistrates duly authorized, who have possession and cognizance of the fact; to the exclusion of the separate jurisdiction of all others. So that the acts of any other, except in conjunction with the first, are not only void, but such a breach of the law as subjects them to indictment.” *Rex v. Sainsbury* (*c*); there the marginal note is, “When two sets of magistrates have a concurrent jurisdiction, and one appoints a meeting to grant ale licenses, their jurisdiction attaches so as to exclude the others appointing a subsequent meeting; but they may all meet together on the first day. But if, after such appointment, the other set of magistrates meet on a subsequent day, and grant other licenses, their proceeding is illegal, and the subject of an indictment.” [*Parke, B.*—You have to make out that there can be only one application for this order, and that the parties are confined in making that application to one set of justices.] That is so; by the stat. 4 & 5 Will. IV. c. 76, s. 72, it is enacted, “that when any child shall hereafter be born a bastard, and shall,” &c., “become chargeable to any parish, the overseers or guardians of such parish, or the guardians of any union in which,” &c., “may, if,” &c., “after,” &c., “apply to the next General Quarter Sessions of the Peace, within the jurisdiction of which,” &c., “for an order upon the person whom they shall charge with being the putative

(*a*) Page 27.

(*b*) See also *per* Lord Kenyon, C. J., in *Rex v. Sainsbury*, 4 T. R. 456.

(*c*) 4 T. R. 451.

father," &c. "And the Court to which such application shall be made, shall proceed to hear evidence thereon; and if it shall be satisfied after hearing both parties, that the person so charged is really and in truth the father of such child, it shall make such order upon such person in that respect as," &c. The jurisdiction is wholly spent in making the first order; there is no provision for any second application. By stat. 2 & 3 Vict. c. 85, s. 1, it is enacted, "that the guardians of any parish," &c., "may, if they think proper, at any time within three calendar months after such child shall become chargeable, apply to the Justices of the Peace holding any special or petty session in and for," &c., "for an order upon the person whom they shall charge with being the putative father of such child," &c.; "and the Justices then and there assembled, not being less than two, shall proceed with respect to the application, and shall have all the powers and duties in regard thereunto, which are given to the Court of General Quarter Sessions, by 4 & 5 Will. IV. c. 76." The intention of this statute was to transfer to the Justices acting in petty session the same power that they had at the quarter sessions, and that power was in no way extended. Then came the statute 7 & 8 Vict. c. 101 (a), under which the present orders were made. This statute was modified by 8 & 9 Vict. c. 10; the latter statute was not however material for the purposes of the present inquiry. Sections 2 and 3 of statute 7 & 8 Vict. c. 101, were the important sections. By section 2, it is enacted, "that any single woman who may be with child, or who may be delivered of a bastard child, after the passing of this act, or who has been delivered of a bastard child within the period of six

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(a) By sect. 1, "All powers for obtaining or making an order upon any putative father for the maintenance of a bastard child, shall cease and determine except as 'thereinafter provided.'"

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calendar months before the passing of this act, may, either before the birth or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has, within twelve months next after the birth of such child, paid money for its maintenance, make application to any one Justice of the Peace acting for the petty-sessional division of the county, or for the city, borough or place in which she may reside, for a summons to be served on the man alleged by her to be the father of such child; and if such application be made before the birth of the child, the woman shall make a deposition upon oath, stating who is the father of such child, and such Justice of the Peace shall thereupon issue his summons to the person alleged to be the father of such child, to appear at a Petty Session to be holden after the expiration of six days at least, for the petty-sessional division, city, borough or other place in which such Justice usually acts. And by section 3, it is enacted, "that after the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person or left at his last place of abode, six days at least before the Petty Session, the Justices in such Petty Session shall hear the evidence of such woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father; and if the evidence of the mother be corroborated in some material particular by other testimony to the satisfaction of the said Justices, they may adjudge the man to be the putative father of such bastard child; and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment," &c. This is all the jurisdiction the Justices have under the statutes. [*Parke, B.*—You say the jurisdiction is restricted to the

first two Justices by whom the order was made, and that no others have any power.] That is so, if an order be made, *Reg. v. Gloucestershire* (a). It was unnecessary for him to contend that immediately upon application the power is exhausted; but when there has been a decision and an order made, the jurisdiction is determined, unless such order be got rid of by certiorari or appeal. If the second set of magistrates may look to the order of the former ones, to see if it be valid, and then make a second order, there will be frequently two good orders existing at the same time. He knew that he should be met with the objection that the man might have appealed, but the woman could not: the woman, however, might have removed it by certiorari, and the order would then have been quashed, and a new order made. [*Coltman, J.*—Do you say this is a nullity, or not a nullity?] He objected to the word nullity—it was invalid—but it had so much legal force, that while it was in operation, no other magistrates could act. [*Coltman, J.*—You contend that although it was so invalid that it might be got rid of by certain proceedings, still it was in force.] He said it was *res judicata*, and must be got rid of in a legal manner. It was admitted that the supersedeas was entirely inoperative; if that were so why did they endeavour to get rid of it? He then cited *Pridgeon's case* (b), *Rex v. Tenant* (c), *Rex v. Smith* (d). He took the effect of those cases to be, that where a proceeding of this nature is had before a Court of Petty Sessions, they have concurrent jurisdiction with the Quarter Sessions; and that when a hearing has taken place, it is incompetent to apply to two other Justices for the purpose of obtaining a second order. In *Reg. v. Buckingham-*

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(a) Not yet reported.

(b) Jon. W. 330; see also *S. C. Cro. Car.* 341.(c) 2 *Ld. Raym.* 1423; see also *S. C. 2 Stra.* 716.(d) 2 *Bulst.* 342, part ii.

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shire (a), a woman applied for an order of affiliation to the Justices of the petty-sessional division in county A., and was refused. She subsequently removed into county B., and then made a second application, and the Justices made an order, which, on appeal, was confirmed by the Quarter Sessions:—held, that as the Petty Sessions and the Quarter Sessions had general jurisdiction over the subject-matter, they were bound to hear and determine such second complaint; and that although proof of the former application having been dismissed upon the merits *would have been a good answer to such second application*, neither the decision of the Justices, nor of the Quarter Sessions, could be reviewed by this Court. [*Parke*, B.—In that case it was not considered as a matter of jurisdiction, but as a matter of evidence.] That was so, and he felt it might be used against him; and it was because of that, that he had troubled the Court with the old cases, to show that it is a matter of jurisdiction. In *Rex v. Jenkin* (b), Lord Hardwicke, C. J., in speaking of the authority of Justices out of Session, in cases of bastardy, says, “When their opinion was given, it should not be drawn over again by the same Court, or by two Justices; it would be absurd that when two Justices have power by law to make original orders, and the Sessions have power of appeal from those orders, as well as by original application, that two Justices might alter their orders, when those very orders of alteration may be reversed by the Quarter Sessions.” This case is not at all shaken by *Reg. v. Buckinghamshire* (c). There was then the question why a form should be gone through to get rid of an order which is bad upon the face of it. The case of *Barons v. Luscombe* (d), was an authority

(a) 18 L. J., M. C. 113.

(b) Ca. t. Hard. 301; S. C. 2 Sess. Ca. 229.

(c) 18 L. J., M. C. 113.

(d) 3 Ad. & E. 589; S. C. 4 L. J., M. C. 109.

showing the necessity of such a proceeding. [*Parke, B.*—There the order was good upon the face of it.] In *Reg. v. Fordham (a)*, there were many defects upon the face of the order. So in the case of *Rex v. Cheshire (b)*, where the Justices had made an order, defective in point of form, against which the party gave the Justices notice of appeal, and it was held that the Justices could not amend the order; so here *à fortiori*, they could not cancel it. The regular legal mode must be adopted of getting rid of it; and so long as the order is in existence, they cannot make another: and for this purpose there is no other course than by applying for a certiorari. [*Parke, B.*—If this order had been quashed on appeal, or moved by certiorari, would any other Justices have had jurisdiction?] They might. [*Parke, B.*—Do you contend the whole jurisdiction is confined, as under the old law, to the first two Justices? if so, the quashing would be of no avail.]

Johnson, J. J., in support of the order.—This question has already been virtually decided. In *Reg. v. Hinchliffe (c)*, the order was good upon the face of it. [*Patteson, J.*—That was a particular case, turning upon affidavits.] In this case nothing had been done upon the first order; no notice of appeal had been given. It had been attempted to draw a distinction between null and void, and invalid. It is said the Justices are *functus officio* as soon as they have exercised an authority; even though such exercise be invalid. If that were so, the principle would apply as well to orders of removal, as to orders in bastardy; it would come to this, that when an application is made by a poor woman, and the order is bad, by reason of the omission of the clerk to insert some words, immaterial, except as being declaratory of the fact, the statute would be nuga-

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(a) 11 Ad. & E. 73.

(b) 5 B. & Ad. 439; 2 L. J., M. C. 95.

(c) 10 Q. B. 356; S. C. 16 L. J., M. C. 78.

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tory, for it would be impossible for her to move for a certiorari. Supposing an application made, and the Justices to entertain it, and refuse to make any order, it would be clearly a judicial decision, and would, according to the argument on the other side, conclude them and all other justices. If that be the result of the argument, there is express authority that the mere fact of dismissal by a magistrate will not exclude other magistrates from entertaining the case. *Reg. v. Jenkin* (a). If they make no order it is no legal exercise of their judicial authority; yet, (according to the argument on the other side, no other application could be made: so that it would operate as an acquittal;) and then it comes within the principle of *Rex v. Jenkin*, which shows that application may be made to two other justices, after a former application to two justices having jurisdiction. And it is also said, in *Rex v. Jenkin*, that the power to make orders in bastardy (depending on stat. 18 Eliz. c. 3) "is not a power of judicature or conviction" (b). If, after a refusal by two justices to make an order, other justices may make the order, *à fortiori* might it be made in this case, when the first order was merely formally invalid. It has also been assumed in various cases, that the magistrates have the power to make a second order. Orders of removal are constantly superseded, and yet there is no legislative enactment authorizing the supersedeas. [*Lord Denman*, C. J. —Those are all cases of consent.] In *Reg. v. Bridgman* (c), it is expressly admitted by counsel, that if a former order be bad a second order might be made. That was a case in which the justices at petty session refused to hear an application for an order in bastardy; unless it

(a) 2 Sess. Ca. 229; S. C. Ca. t. Hard. 301.

(b) From *Rex v. Jenkin*, *semble*, an order made at Quarter Sessions only is final.

(c) 2 N. S. C. 232; S. C. 15 L. J., M. C. 44.

was shown that a former order, said to have been made by the same justices, was quashed, and not quashed upon the merits. This is analogous to an order of removal invalid upon the face of it, where it is not only competent to the magistrates to do away with it, but it has been again and again recommended by the Court that such a course should be adopted. All the authorities upon this subject are to be found in *Reg. v. The West Riding of Yorkshire* (a). In that case (b), Lord Denman observes, "It is a beneficial practice that, when a valid technical objection to the order is pointed out, the removing parish should give it up and try to procure another order, which may be maintainable on the merits." And in *Reg. v. St. Pancras* (c), his Lordship also observes, "We have frequently recommended, from this place, that an objectionable order should be abandoned by those who obtained it; and another, free from objection, applied for." That is the very course which has been pursued in this case; or, if there be any difference in the cases, this is the stronger, inasmuch as the order was abandoned by the same justices who made it. He again referred to *Reg. v. Buckinghamshire*, which showed that the magistrates had jurisdiction to make a second order, the former one being invalid. He also cited *Maunder v. Collett* (d), where it was held that a defendant might waive an order for particulars. *Wickens v. Cox* (e) was upon the same point. *McDougall v. Nicholls* (f) decided that a party obtaining an order may always abandon it. [*Patterson*, J.—Had the orders been served in those cases?] He believed they had: it was so in *Maunder v. Collett*. Those cases showed clearly that the order might be abandoned without any supersedeas, or any certiorari. He

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(a) 2 Q. B. 705; S. C. 11 L. J., M. C. 57.

(b) *Ibid.* p. 713.

(c) 3 Q. B. 352; S. C. 12 L. J., M. C. 52.

(d) 3 C. B. 554; S. C. 16 L. J., C. P. 17.

(e) 4 M. & W. 67.

(f) 3 Ad. & E. 813.

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admitted the general principle, in *Rex v. Tenant* and *Rex v. Smith*, that a person cannot be twice put in peril upon the same fact, but here the party has never been in peril at all; for it is admitted that no proceedings could have been taken upon the first order; and in those cases a second order was quashed, because the former order had been discharged by the Quarter Sessions upon the merits. In the other cases referred to, the orders were valid upon the face of them. He did not know whether it was so in the case of the Poor Rate, but that was no analogous case; for there the order is not made by the justice, they have merely a ministerial office; besides, it affects the whole parish, and any one may appeal against it. All the cases cited on the other side are to be distinguished as cases in which some steps had been taken upon the order (a), or the party was put in peril by the first order and could not be jeopardised a second time; or the order was good upon the face of it; in which cases perhaps it could only be got rid of by certiorari. But these cases do not apply where the order is upon the face of it invalid. [*Parke, B.*—Where the order is valid upon the face of it, it may be enforced in the mean time.] A distinction between invalid and void was contended for in respect of the first order; if void, it is a mere nullity; if invalid, authority has been quoted which shows, that where magistrates have made an invalid order they may make another. He therefore submitted the verdict must be entered for the Crown.

Creasy in reply.—There is a distinction between orders of removal and this order. In *Reg. v. St. Pancras*, Lord Denman says, “An order of removal is merely a warrant to parish officers to take the pauper to the parish indicated” and it is founded on *ex parte* examinations; in the Act of Parliament it is called a warrant, although ordinarily called

(a) See *Reg. v. Middlesex*, 11 Ad. & E. 109; S. C. 9 L. J., M. C. 59.

an order. It is said that *Rex v. Jenkin* is a distinct authority in favour of the Crown; but, if we look to the stat. 18 Eliz. c. 3, under which that case was decided, we find the enactment not at all analogous to the present statute. [*Parke, B.*—Suppose the parties go before two justices, and afterwards for some reason withdraw, they might go to two others.] There has been some doubt upon it, for in that case the woman might go to several, until she came to those disposed to give her the most money: attention has been drawn to Judge's orders, and it is said the parties obtaining them may abandon them; that has been said to be like the present case; but what is wanted on the other side is an authority to show, not that the parties may abandon the order, but that they may obtain a second order, while there is a prior one in full force upon the same matter.

LORD DENMAN, C. J.—The first order being altogether bad, null and void, could have no operation; it appears to me clear therefore, upon first principles, that the two other justices could make the second order, and therefore it was good, and that disobedience of such good order is indictable.

PARKE, B.—I also think that the prisoner was properly convicted; if the two justices to whom application was first made, had refused altogether, it is admitted the others would have had jurisdiction. The statute gives general jurisdiction to two justices, and if those to whom application is first made refuse to make an order, or make an invalid one, the party may make further application to two other justices; that being so and the first order in this case being equivalent to no order at all, (for if it would not bind the father it would not bind the mother, and must therefore be treated as a nullity,) the second set of justices had jurisdiction, and that is the effect of the judgment of Erle, J. in *Reg. v. The Justices of Buckinghamshire (a)*;

(a) 18 L. J., M. C. 113.

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whether the other part of that judgment be correct or not it is not now necessary to decide, at all events it appears to be at variance with *Rex v. Jenkin*, but it is clearly right in this, that a refusal by the first parties is not binding upon the others.

PATTERSON, J.—I think the first order being bad it might be treated as so much waste paper altogether. I am not prepared to go the length of saying that if the parties were not satisfied with the first order they might go to two other justices; but this might be treated as no order at all, and that being so it was open to other magistrates to make an order upon application to them. I would strictly guard myself from having it supposed that this is any decision on my part in the case in the Queen's Bench (a) not yet determined.

COLTMAN, J.—The words of the statute are, “in the presence and hearing of the party;” it does not appear that the evidence was taken in the presence and hearing of the party, the order was therefore bad under the statute, and was invalid at common law, and being invalid (notwithstanding the objection raised by Mr. Creasy) I consider it a nullity, as if the magistrates had done nothing, and nothing being done a second order might be made.

WILLIAMS, J., concurred.

Conviction affirmed.

(a) *Qu. Reg v. Thomas*.

THE QUEEN *against* ELIZA COOPER.

PLEADING.

1849.

Saturday,
June 2.

“THE prisoner was found guilty at the May Sessions of the Central Criminal Court, upon the second count of an indictment, which charged that she ‘being an evil-disposed person, and contriving to injure and aggrieve the inhabitants of the parish of Barking; and unjustly to burden the said parish with the charge and maintenance of a certain female child of very tender age, to wit, the age of one month, whose name to the jurors aforesaid is unknown, which the said Eliza Cooper had in her care and custody; afterwards, to wit, on the same day, &c., with force and arms at, &c., unlawfully and injuriously did take, carry, and convey the said female child which she so had in her care and custody, into the parish of Barking, in the county of Essex, and within the jurisdiction of the said court; and then and there in a certain open and public place and Queen’s common highway there called Barley Lane, to wit, about the hour of eight of the clock in the morning of the same day, unlawfully did leave and desert the said child upon the ground of and in the said lane, contrary to her duty in that behalf, the said child being of such tender age as aforesaid, and unable to take care of herself.’

An indictment for leaving and deserting an infant child of tender years, with intent to injure and aggrieve the inhabitants of, &c. is not sufficient, there being no averment that the child was settled elsewhere, nor any allegation that the child received any damage, or was likely to do so.

“The first count of the indictment alleged the child to be the prisoner’s own child, but there was no evidence to support that allegation, nor any evidence to show how the child came under the prisoner’s care and custody.

“The Judge respited the sentence, and reserved the case for the opinion of the Judges in the Court of Criminal Appeal in the Exchequer, whether the second count was sufficient.

“EDWARD BULLOCK.”

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No Counsel appeared on either side.

LORD DENMAN, C. J.—In this case I am of opinion there is no offence stated.

PARKE, B.—I think the count cannot be supported. It does not appear that the child was settled elsewhere; neither is there any allegation that the child received any damage, or that it was likely to do so.

Conviction reversed.

SITTINGS AFTER TRINITY TERM,

IN

THE THIRTEENTH YEAR OF THE REIGN OF VICTORIA.

CORAM

WILDE, C. J.,
ALDERSON, B.,WIGHTMAN, J.,
CRESSWELL, J.,

PLATT, B.

THE QUEEN *against* THOMAS ILLIDGE.*Case reserved by the Honourable Justice Cresswell.*

FORGED WARRANT, &c.

“THE prisoner was tried before me at the Central Criminal Court in February last, on an indictment which charged him with feloniously uttering a forged warrant for delivery of goods, to wit, wine, well knowing the same to be forged, with intent to defraud the London Dock Company; other counts described the instrument as an order and as a request. There were other counts in the indictment, similar in form, but charging an intention to defraud Samuel Vincent and another.

“It was proved that the prisoner, on the ninth of January, went to the London Dock, and presented to a clerk in the service of the company in the Crescent Vault wine department, a document called a tasting order, of which the following is a copy :—

(a) This case was argued in Easter Term, on Monday, April 30, before the Judges above mentioned.

1849.

*Saturday,
June 23 (a).*

An instrument in the following form : “ Permit Self and Co. to taste wine, ex Traveller,” &c., directed to the cooper at a particular vault in the London Docks, and purporting to be signed by the owner of wine in that vault, is an order for the delivery of wine ; although the cooper, by the Dock regulations, could not act upon it, until counter-signed by a clerk of the Company.

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1242
S 32

To the Cooper.

Vault, London Docks,

184

Permit Self and Company to taste wines,
Ex Traveller, Captain Austin @ Cadiz.
Entered by Williams, May, 1848.

Mark.	No.
D. A.	112
◇ P.	114

Butts.
Vincent and Pugh.

Tasted
Sampled

Casks, Nos.
ditto

shown by {

“The course of business at the London Docks, with reference to such orders, is that the merchant who has wine in the vaults, and wishes to enable a party to taste it, gives an order in the form set out. It is then taken to the clerk before-mentioned, and he writes his name across it; and, when it has been so signed by him, but not otherwise, the coopers of the company are authorized to act upon it and allow the party presenting it to taste the wine described in it. The instrument in question was presented to the clerk for his signature, but he, suspecting it was not genuine, refused to sign it, and said he must first send to Vincent and Pugh. The prisoner said he would return in half-an-hour, and went away, but did not return. It was proved that the signature, Vincent and Pugh, was a forgery, and that the prisoner knew it to be so. For the prisoner it was objected that a tasting order could not be considered on order for the delivery of goods; and, secondly, that this never was a perfect order, nor was uttered as such, but was handed to the clerk for his signature, in order that it might become an available tasting order.

“I thought it right to reserve those points for further consideration ; and the jury having found the prisoner guilty, I ordered him to be discharged on his own recognizance, to appear and receive judgment when called upon so to do.”

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Huddleston, for the prisoner.—The prisoner was indicted for forgery under the stat. 11 Geo. IV. & 1 Will. IV. c. 66, s. 10, the words of which are, “any person who shall forge,” &c., “any warrant, order, or request for the delivery or transfer of goods.” The first question is, whether this is a warrant, order, or request *for the delivery of goods*—whether an order to taste wine, simply, is an order for the delivery of goods—whether an order for the gratification of any one of the five senses is sufficient—an order to see, to smell, to hear, to feel, or to taste. [*Wilde*, C. J.—You look at a picture, and there it remains; you taste the wine, and it is gone.] I cannot present this point to the Court with more force than in the words reported to have been used upon the trial by Cresswell, J.: “An order for the delivery of goods means that they are to be delivered to the party to be dealt with as his own, in any way he pleases. This wine is not so delivered, it is delivered to him for the special purpose of tasting, and nothing else; he has no other control over it.” [*Platt*, B.—It is an order to deliver wine to be tasted.] The question is, whether a permission to taste wines is necessarily an order to deliver certain goods; an order to deliver must be an order coming from a person, to deliver to another that over which he has an entire and absolute control. The wine is not necessarily swallowed. The document does not amount to an order to remove any wine, it is simply a permission to taste and nothing more. Suppose a person to have an order to smell any highly aromatic perfume, this could not be an order to deliver, though some of the fragrance would escape from the bottle every time it was

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opened. It was not possible to say this was an order to deliver the wine, for the party would have had no right to take any portion of the wine away. [*Wilde*, C. J.—Suppose an order to eat a dinner—so, this is an order to consume a portion of the wine. Put the case of an order to take samples.] That would be giving the party an absolute power over the samples. [*Alderson*, B.—The meaning of the order clearly is to take a certain portion of the wine for the purpose of tasting.] And, in that case, would the giving of the wine be a delivery within the meaning of the Act? [*Platt*, B.—How is the order obeyed, but by a delivery of a portion for the purpose of being tasted?] It is merely giving a limited control, and not the absolute possession. [*Wilde*, C. J.—That limited control goes to the entire destruction of the commodity.] An order to taste may be satisfied by the smell only. [*Wilde*, C. J.—But the order is to taste. *Platt*, B.—Is it any thing more or less than an order to deliver a sample?] As to the next question—whether this was a perfect order. It was an instrument addressed to the cooper, but the person to whom it was addressed had no authority to obey it until it was countersigned by the clerk to the Dock Company; and, therefore, until signed by him it had no operation for the purpose intended; this, therefore, being an invalid instrument at the time of forging, it is not such an uttering as to bring the party within the meaning of the statute. An order must import an absolute obligation, upon the party upon whom it is made, to comply with it. In its present state, not only was the party not bound to comply, but he was not at liberty to comply with it. This was not a warrant or order upon a person who was obliged to obey. A request would import no authority on the part of the person making it—this is not a request, but purports to be given by some person having authority; the words being “*permit*,” indicating a necessity of obedience on the part of the

person to whom it is directed—in East, P. C. (a), it is said, “It seems now settled that if the *warrant* or *order*, mentioned in the Stat. 7 Geo. II. c. 22, do not purport on the face of it, or be shown by proper averment, to be made by one having authority to command the payment of the money, or direct the delivery of the goods, and to be compulsory on the person having possession of the subject-matter of it; but only purports to be a request to advance the money or supply the goods on the credit of the party applying, which the other may comply with or not, as he sees proper: it is not a warrant or order within the statute.” And in *Reg. v. Williams* (b), which was an indictment for forging “a certain warrant and order for the payment of money,” the instrument was in the following form:—

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“Messrs. Wilkins and Co., Bankers, Merthyr.

“Please to advance the bearer, Samuel Richards, the sum of two hundred and fifty pounds, and place the same to my account.

“Morgan Thomas,
“Cold (c) Merchant, Uniscoy.”

and Wightman, J., in giving judgment, said: “I am of opinion that the instrument is a warrant; and I am also of opinion that it is not an order, because it appears, from the nature of the contract between Mr. Morgan Thomas and the bankers, that the bankers were not bound to obey it; although in point of fact they did obey it.” There was also another class of cases—those in which there has been no payee in a promissory note, as in the case of *Rex v. Randall* (d): there it was held that there must be a payee; forging an instrument, payable to *blank* or order, is not sufficient. [*Platt*, B.—Suppose the cooper to have acted

(a) Vol. II. p. 936.

(b) 2 C. & K. 51.

(c) *Sic*.

(d) Russ. & R. 195.

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upon the order without the signature of the clerk.] It could not be so, because the cooper is expressly forbidden ; and it is found in the case, that the instrument was of no validity whatever. [*Platt*, B.—That is on account of the regulation of the docks. The case you have stated is one of an instrument not transferable.] In *Rex v. Richards* (a) the prisoner drew a bill upon the treasurer of the navy, payable to blank or order, and signed it in the name of a navy surgeon ; and it was held, that to constitute an order for the payment of money there must be some payee. In this case the practice must be looked to and coupled with the instrument. The parties, by the fact of their keeping the goods in the docks, enter into an agreement with the company, that the goods shall be deposited there subject to the dock regulations. This arrangement is as much for the benefit of the merchant as of the docks ; and by reason of those regulations this document is as incomplete as a bill of exchange without a payee, or any document not in accordance with the requirements of an Act of Parliament. [*Alderson*, B.—With respect to bills of exchange, all such instruments must be payable to a third person. *Wilde*, C. J.—This is not like the case of an instrument not in accordance with the requirements of some Act of Parliament : the regulations of the Dock Company are not imperative.] In *Rex v. Pateman* (b) it was held, that the forging or uttering a note which for want of a signature is incomplete is not within the statute which makes forging notes capital. [*Alderson*, B.—In that case there is no person who promises ; here there is a person who orders and a party ordered. The signature of the clerk is merely saying, “This is an order you are bound to obey.”] That being so, it does not come within the meaning of the word “order,” as not being (until signed by the clerk) compulsory on the

(a) Russ. & R. 193.

(b) Russ. & R. 455.

party to whom directed. In *Rex v. Rushworth* (a) it was held, that forging a magistrate's order to pay money was not a capital offence, if the Act of Parliament under which alone the magistrate has power to make the order requires it to be under hand and seal, and it is under hand only ; and if it is addressed to a character on whom the magistrate has no power to make such order by the Act. There the document was incomplete, because the statute had not been complied with. [*Alderson*, B.—The party had no authority to make the order.] In the present case, Vincent and Pugh had no power to make an order without the counter-signature of the clerk, inasmuch as they had submitted themselves to the regulations of the Dock Company. In *Rex v. Rushworth* the sealing of the order was a necessary proceeding under the statute. By the practice of the Docks the counter-signing was as necessary to make this instrument valid, as the sealing was necessary by the Act of Parliament in that case. The instrument must have the joint assent of the proprietor and the Dock Company ; and, when the two parties have combined to make it a good order, then it becomes a valid document, and not until then is it available as an order. [*Platt*, B.—Suppose it required a stamp, would the absence of a stamp render it the less an order? How can the clerk, by writing his name upon it, enter into the mandatory part of the instrument? Cannot the merchant remove his own wine without the consent of the Dock Company?] He apprehended not: the Dock Company held the wine as a security for the payment of the duties. Suppose this regulation to be a statutory regulation : it is clear that, in such case, all the requirements must be fulfilled. Then comes the question, What is the effect of the practice in this case?

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(a) Russ. & R. 317.

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Is not the party bound by the practice as much as he would be by an Act of Parliament? In *Rex v. Rushworth*, as cited in Russell on Crimes (a), Bayley, J., is reported to have said: "To bring the case within the statute, the order must be such as, on the face of it, imports to be made by a person who has a disposing power over the funds. In this case the party looking at the Act must have known that the order was not made by one who had a disposing power over the funds in his hands. The magistrate, as an individual, had no right to make such an order; and the treasurer had no right to consider it as an order which he was bound to obey. The magistrate, in his character of justice of the peace, had no authority to make such an order: if he had any, it was derived from the statute. But he had no power to make such an order as this; and if such a one had been made, the treasurer ought not to have obeyed it." A person, by putting wine into the docks, submits himself entirely to their regulations. [*Wilde*, C. J. —Certainly not: it is not in their power to limit the right of the merchant as to his own property. Here the document purports to be an order drawn in the course of business: the case states what is the course of business. The merchant does not act in his right as owner of the goods. He would have no right to give an order to the servants of the company, but that the company themselves give him an authority. In this case it is stated that the merchant, acting upon the course of business, gives an order upon the cooper of the company. It does not depend upon the right of the party giving the order; but by the regulations of the company who give the power to the merchant to order their servant instead of ordering themselves, which order may be acted upon. It is necessary therefore

(a) Vol. II. p. 517.

when the order is made, that it should be made in conformity with the regulations under which the power is given, and be of such a character that the cooper could act upon it. Here it wanted an intermediate signature: Was it therefore a valid order, requiring the cooper to conform thereto? It is only when countersigned that it is an order he would obey.]

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Ballantine, for the prosecution.—[*Wilde*, C.J.—Address yourself to the second point.] The instrument is described in three ways, and in one view of the case it is all three. It is an order to the company, a warrant to the company, and a request to the cooper. The real question will be, Is this an instrument obligatory upon anybody? He submitted it was obligatory upon the Dock Company. Supposing the regulation, that orders of this kind should be countersigned, not to be known by the merchant, and that the Dock Company disobeyed the order. In an action, they must show that the merchant was aware of the regulation. The Dock Company are bailees, and the merchant has a right to have a delivery of his goods; and he has a right to give these orders for a delivery of a portion of them. Supposing there were no Custom House regulations, upon the payment of the charges the owner would be entitled to the delivery of the goods. This is not a matter connected with the payment of any charges; it is therefore an order which the company was bound to obey. Suppose, when the order was delivered, the company were to rescind the regulation as to the signature of the clerk; in that case all the regulations would have been complied with, and the result would be that the company would be bound to deliver the goods. Is it, because of some intervening matter, the less an order when completed so far as the merchant can make it? It is called a warrant: the difference between a warrant and an order is this; the order is obligatory upon the person upon whom it is intended to act: a

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warrant is not obligatory upon the person upon whom it is intended to act; but is an authority warranting him in the performance of the Act: and the question is, Is not this a warrant upon the Dock Company? It is an instrument which, if complied with and complaint be made by the merchant, the company would justly say, We had your warrant for the performance of the act. [*Platt*, B.—Is the act of the company itself in any way to form a part of the order upon the company?] It does not appear that there was any privity between the merchant and the Dock Company; they may rescind their regulation at any moment, and direct that a director should countersign the document for the future. [*Wightman*, J.—Suppose the merchant does not think fit to present it to the clerk at all, and therefore delivers it to the cooper, and he refuses to act upon it, could the merchant maintain an action against the company?] He submitted that would be like the case of non-payment of a check by a banker. [*Cresswell*, J.—I had no doubt, at the trial, that every merchant was cognisable of the regulations of the Dock Company; when a person places goods in the docks, it is not likely but that he should be acquainted with the regulations of the company.] He would assume that the regulations were known to the merchant; yet, these regulations might be rescinded at any time without the concurrence of the merchant. It may be a question for the consideration of the jury, whether the merchant did assent to the regulations of the company. An order need not show upon the face of it the authority of the party to make it, or the duty of the other to comply; so a warrant or request; the proper way is to look at the result: that is so in all criminal cases—we must look to the natural result of the act. [*Cresswell*, J.—Suppose it to be an arrangement between the parties, and the cooper acts upon it, not countersigned; it would be no protection to the company.] He knew nothing of the cooper, except as part

of the company. [*Wilde*, C. J.—It is not clear the company might have refused to act upon the order to the cooper, unless given according to their form]. Although a form directed to the cooper, it is in substance directed to the company; what is the operation of the instrument? [*Platt*, B.—The practice of the Bank of England, with reference to the transfer of stock, is very applicable to this case.] The signature of the clerk is for the protection of the company; and it is not the less an order by the merchant, because not so signed. He therefore contended this was an order and a warrant, operating upon the company; and which, though it might require the signature of the clerk, they were bound to act upon. [*Wilde*, C. J.—What is the difference between a warrant and a request? Where a request is made to a person who cannot lawfully comply with it—*qy.* is it a request within the statute? *Alderson*, B.—A warrant implies authority as well as an order. *Platt*, B.—It is contended on the other side, that, according to the language of the instrument, this is an order to the cooper which cannot be complied with without the counter-signature of the clerk]. The answer to that is, that it is an order upon the company. Suppose the privity of contract to be between the cooper and the merchant, he should admit that, as regarded the cooper, it could not be contended that this was a perfect instrument at the time. But the cooper is merely a name for the Dock Company; the company would be bound to deliver goods upon an order to the cooper. Can it be contended that this was not a request to deliver goods, when the result would be a delivery of them? [*Alderson*, B.—An order is, where a party has a right to have the goods delivered; and it is addressed to the party having the possession of them. A warrant is, where a party has a right in the goods, and warrants the party having possession of them, and to whom it is addressed, to deliver them; the warrant being an authority. A request is, where the party

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does not order; but hopes the person to whom it is addressed will deliver the goods. If this is an order on the cooper, it is not perfect as an order on him. It is not a warrant to the cooper; a warrant must have been to the company: neither is it a request; because not addressed to a party who has a right to deliver]. It is a warrant which would have justified the company in the delivery, although it was not countersigned by the clerk. All goods in the Docks are the property of the company by Act of Parliament; and, therefore, every order for a delivery of goods out of the docks is an order upon the company. [*Cresswell*, J.—The goods of the company;—for what purpose?] For the purpose of bringing actions in reference to them. [*Platt*, B.—You cannot say the goods belong to the company.] He merely meant to say they belonged to the company as against the cooper, who had no property in them whatever. [*Alderson*, B.—I do not see how we can travel out of the instrument itself. Is it an order, a warrant, or request upon the company?]. Strike out the word “cooper” altogether. [*Wilde*, C.J.—That is altering the case altogether. *Alderson*, B.—The charge is for forging this document, and not something else. *Wilde*, C. J.—When you speak of the natural result, you overlook the whole case, and treat this as a genuine order;—that is the whole question. *Alderson*, B.—The question is, whether an order upon the cooper might not be an order of the merchant independently of the signature of the clerk.] He contended it was an order upon the company. [*Platt*, B.—If the argument on the other side is correct the signature of the clerk would have made it a forged order although the forgery was clearly committed before. *Alderson*, B.—When the man signs the document, it is his intention that the clerk should sign it after him.] The cases cited supported the view he had taken of this case: he would merely quote them for that purpose. In *Rex v. Randall*, which was an indictment for forging a bill of

exchange, there was no payee, and therefore it could not properly be called a bill of exchange, because it could not be negotiated. [*Wilde*, C. J.—The instrument, in the case stated here, is of so different a character that the cases cited cannot be considered as any authority in this case.] He then contended that the instrument being intended to operate upon the company, it was an instrument binding upon the company and within the meaning of the statute. [*Wilde*, C. J.—The impression of the court is, that it is an authority for the delivery of goods.]

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Huddleston, in reply, cited Russell on Crimes (*a*), showing the distinction between a request, warrant, and order; taking the definition as there laid down by Alderson, B. This was not an order; for, in the very form of it, no authority on the part of the person giving it is implied. It is like the case of two parties depositing with a third goods for their joint use; the joint owners being the company and the merchant, who give an order jointly upon the cooper—the one in his own hand, the other by the clerk. This was not an order, warrant, or request within the meaning of the statute.

WILDE, C. J.—On the first point there is no doubt as to its being an authority for the delivery of the goods. As to the other point,

Cur. ad. vult.

WILDE, C. J., delivered the judgment of the Court as follows (*b*):—Upon consideration, we are of opinion that the conviction in this case was right. The first question is, Whether the instrument which the prisoner uttered, knowing it to be forged, was an order. It was directed to the cooper at a particular vault in the London Docks, and

(*a*) Page 522.

(*b*) The Judges present at the delivery of the judgment were, Wilde, C. J., Rolfe, B., Cresswell, J., Platt, B., and Williams, J.

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purported to be signed by the owner of wine in that vault, and was in this form :—“ Permit self and company to taste wines, ex Traveller, &c.,” which must mean, “ Permit the party signing, and company, to taste :” the order therefore to the cooper, to permit the wines to be tasted, was given by that party. It is true, that the order was presented by the prisoner to a clerk of the company, in order that he also might affix his name to it ; and, without his signature, the cooper had no authority to obey the order ; but it was not the less an order, because the cooper had not authority to obey it. Again, assuming that the signatures of both the merchant and the clerk of the company were necessary to make a perfect and efficient order, it would be an order by each as soon as his signature was affixed. If a promissory note were made payable to A. and B., not in partnership, or their order, so that the signature of both would be requisite to make an efficient indorsement, a party forging the indorsement of A. and uttering the instrument to B., for the purpose of procuring his signature, would be guilty of uttering a forged indorsement. *Winterbottom’s case*, Denison’s Crown Cases, 41. Upon the same principle, we think that the prisoner in this case was guilty of uttering a forged order. The next question is, Whether it can be considered as an order for the delivery of goods ? Now, although it is true that the quantity delivered for the purpose of tasting is very small, yet it is impossible to say that it is not an order for the delivery of some wine ; and, as we cannot apply the principle of “ *de minimis non curat lex* ” to such a transaction, we feel bound to say that it was an order for the delivery of goods, and that the verdict of guilty was right.

CONSIDERED BY

WILDE, C. J., CRESSWELL, J.,
 ROLFE, B., PLATT, B.,
 WILLIAMS, J.

THE QUEEN *against* JOHN PASCOE.

CORRUPT RECEIVING OF MONEY.

THE prisoner was indicted under the statute of the 3 Geo. IV. c. 29, s. 58, for that he 'corruptly feloniously did take and receive of and from Hannah Turley certain money and reward, to wit, three sovereigns, upon pretence and upon account of then and there helping and aiding Hannah Turley to certain goods and chattels, to wit, fourteen cheeses, which said goods had been before her feloniously stolen; he, the said John Pascoe, not having at the time the person by whom the said goods had been so stolen to be apprehended and brought to trial for the

same prisoner was tried before me, at the last assizes for the county of Warwick.

The facts of the case were these:—The prosecutrix had her house broken open, and fourteen cheeses stolen. The prisoner, who was a tradesman employed by the prosecutrix, called upon her in the course of his business, and avowed that he had some suspicion of the persons who had broken open her house. He proposed and executed a plan, by which he brought to her house the persons whom he suspected of being concerned in the robbery. And, upon

corrupt receiving of such money, within the meaning of the statute 7

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The prosecutrix had had her house broken open, and several cheeses stolen. The prisoner called upon her, and told her he suspected who were the parties. He received from the prosecutrix 3*l.* to purchase part of the cheese. The jury found "*that the prisoner knew the thieves, and assisted the prosecutrix, as her agent and at her request, in endeavouring to purchase the stolen property from them, not meaning to bring the thieves to justice.*" Held, that the receipt of the money by the prisoner was a corrupt receiving of such money, within the meaning of the statute 7 & 8 Geo. IV. c.

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the prosecutrix seeing them, she at once recognised them as persons who had been in her house on the day previous to the night on which the robbery was effected. The prisoner asked the prosecutrix if she did not think they were implicated in the robbery. She said, 'Yes.' He said, 'So do I.' She said, 'I wish you would try if you could buy a bit of cheese of them;' to which he assented, and she gave him 3*l.* for that purpose.

"The prosecutrix saw the prisoner several times; when he told her that the cheese would come. The prosecutrix said, 'You have got the money, and you don't mean to send me the cheese.' He said she might have the money back again whenever she pleased.

"I left to the jury three questions:

"First. Did the prisoner mean to screen the guilty parties, or to share the money with them?

"In which case I thought he was within the meaning of the statute.

"Secondly. Did the prisoner know the thieves, and intend to assist them in getting rid of the cheese by procuring the prosecutrix to buy it?

"In which case also I thought he was within the statute.

"Thirdly. Did the prisoner know the thieves, and assist the prosecutrix, as her agent and at her request, in endeavouring to purchase the stolen property from them, not meaning to bring the thieves to justice.

"To the first two questions the jury answered 'No.' To the third 'Yes.' I directed the jury to find the prisoner guilty, reserving for the consideration of the judges the question, Whether the receipt of the money under these circumstances was a corrupt receiving within the meaning of the statute. I directed the prisoner to be kept in custody, that the opinion of the judges might be taken whether the conviction is right.

"L. C. HUMFREY."

This case was not argued by counsel on either side.

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WILDE, C. J., delivered the judgment of the Court, as follows:—The prisoner was convicted at the last assizes for the county of Warwick, before Mr. Humfrey, upon an indictment framed upon the statute of 7 & 8 Geo. IV. c. 29, s. 58, when a case was reserved for the opinion of the Judges, which stated [his Lordship here read the case.] This case has been considered by the Judges constituting the present Court of Appeal; and we are of opinion that, upon the facts found by the jury, the receipt of the money by the prisoner was a corrupt receiving of such money within the meaning of the statute; the facts found being that the prisoner knew the thieves, and assisted in endeavouring to purchase the stolen property from the thieves, not meaning to bring them to justice; and this finding establishes all the facts necessary to constitute the offence described in the statute. The words of the statute are: “And be it enacted, that every person who shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall, by any felony or misdemeanor, have been stolen, taken, obtained, or converted as aforesaid, shall (unless he cause the offender to be apprehended and brought to trial for the same) be guilty of felony.”

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We think the conviction therefore was legal and proper.

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THE QUEEN *against* JOHN RADLEY.

PLEADING.

An indictment charging the stealing of "two pieces of the current silver coin of this realm, called shillings, *of the goods and chattels* of S. F.," is sufficient; for that the words, "*of the goods and chattels*," ought in such case to be rejected as surplusage.

"AT the adjourned Epiphany Quarter Sessions, holden at Chelmsford, in and for the county of Essex, John Radley was convited of felony, subject to the opinion of the Judges, upon the following case:—The indictment against him alleged, that John Radley, late of the parish of Stifford, in the county of Essex, labourer, on the 3rd day of February, A.D. 1849, with force and arms, in the parish aforesaid, in the county aforesaid, two pieces of the current silver coin of this realm called shillings, of the value of two shillings, of the goods and chattels of Samuel Fitch, then and there being found, feloniously did steal, take, and carry away, against the peace of our lady the Queen, her crown and dignity.

"It was objected that the indictment was defective, in not stating to whom the shillings alleged to be stolen belonged, the words 'of the goods and chattels of Samuel Fitch,' being insensible as applied to money.

"The Court respited the judgment, in order that the opinion of the Judges might be taken upon the validity of this objection.

"WILLIAM COTTON,
"Chairman."

This case was not argued by counsel on either side.

WILDE, C. J., delivered the judgment of the Court as follows:—The prisoner was convicted at the last Epiphany Sessions, at Chelmsford, of having stolen two shillings from Samuel Fitch; when a case was reserved for

the opinion of the Judges, upon an objection to the indictment.

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The indictment charged the prisoner with having stolen two pieces of the current silver coin of the realm called shillings, of the value of two shillings, of the goods and chattels of Samuel Fitch.

It was objected on the part of the prisoner, that the indictment was inconsistent and bad, in charging shillings, the current coin of the realm, to be goods and chattels; and that, as the property stolen was not otherwise alleged to belong to the prosecutor than under the term "goods and chattels," the indictment could not be sustained.

The case has been considered by the Judges of the present Court of Appeal (*b*), and we are of opinion that the objection cannot be sustained, and that the indictment is sufficient.

It is true, that money does not fall within the legal technical definition of "goods and chattels," see *Guy's case*, 1 Leach, 276; and *Morris's case*, 2 Leach, 525; and *Foster's Crown Law*, 73 and 378; but this indictment charges the prisoner with having stolen two shillings, the current silver coin of the realm, which is an accurate description of the property stolen.

We think that, in reading the indictment, the words "of the goods and chattels" ought to be rejected as surplusage; and that the charge in the indictment, as before stated, is that the prisoner stole two pieces of the current silver coin of the realm, of the value of two shillings, of Samuel Fitch; which is a sufficient allegation that the coin stolen was the property of Samuel Fitch: and we think that it is immaterial that the current coin of the realm is afterwards inaccurately described as "goods and chattels," and that the conviction therefore was proper.

(a) The same as in *Pascoe's case*, see p. 141.

THE QUEEN *against* HARRIET LANGBRIDGE.

1849.

Saturday,
June 23.

DEPOSITION.

Upon a charge of obtaining, under false pretences, a promissory note and other valuable securities, it is no objection, to receiving a deposition in evidence, that the caption of the deposition does not state that the money was obtained illegally.

There is no authority requiring any title, or as it is called caption, to an examination; it is sufficient if it be described as the examination of the witness, and (*qy.*) shows that the evidence refers to the charge upon which the prisoner may be upon his trial.

“Devon, to wit.—At the General Quarter Sessions of the Peace of our Lady the Queen, held at the Castle of Exeter, in and for the county of Devon, on Tuesday, the twentieth day of February, in the twelfth year of the reign of our Sovereign Lady Victoria, by the Grace of God Queen of the United Kingdom of Great Britain and Ireland, Defender of the Faith, and in the Year of our Lord one thousand eight hundred and forty nine, before Baldwin Fulford, Esq., Montagu Baker Bere, Esq., and others their companions, Justices of our said Lady the Queen, assigned to keep the peace of our said Lady the Queen, in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanours in the said county committed.

“Harriet Langbridge was indicted for unlawfully obtaining, by means of false pretences, from Mary Rowe, one promissory note for the payment of the sum of fifty pounds and interest, and of the value of fifty pounds, of the property of Charlotte Rowe, with intent to cheat and defraud the said Charlotte Rowe of the same.

“Upon the trial of the prisoner the deposition of Mary Rowe was put in by the counsel for the prosecution. Proof was given that it was taken by the committing Justice in the presence of the prisoner, and that she had a full opportunity of cross-examining the said Mary Rowe, the witness; that it was signed by William Ponsford, clerk, one of the Justices, before whom the same purports to have been taken; and that the said Mary Rowe was, at the time of the trial, so ill as not to be able to travel (*a*).

(*a*) See 11 & 12 Vict. c. 42, s. 17, *ante*, p. 9.

“The charge preferred before the committing Justice was, that the prisoner had obtained the promissory note and other valuable securities by means of false pretences, and of this charge the prisoner was informed by the committing Justice.

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“The caption of the deposition of the said Mary Rowe is as follows :—

“Devon, to wit.—The examination of Mary Rowe, wife of William Squire Rowe, of Thornbury Farm, in the parish of Hittesleigh, in the county of Devon, taken on oath this fourteenth day of February, in the year of our Lord one thousand eight hundred and forty-nine, at Hittesleigh, in the county aforesaid, before the undersigned William Ponsford, clerk, one of her Majesty’s Justices of the Peace for the said county, in the presence and hearing of Harriet Langbridge, late of Moretonhampstead, in the said county, wife of John Langbridge, of the same place, labourer, who is now charged before me this day, for obtaining money and other valuable security for money from the said Mary Rowe, then and there being the money of the said William Squire Rowe, and the said valuable security for money being then and there the property of one Charlotte Rowe.

“It was objected on behalf of the prisoner that the charge thus set forth in the said caption is obtaining money and valuable securities for money, but whether legally or illegally is not stated ; and no offence is therefore shown ; and that the deposition of Mary Rowe was consequently not receivable in evidence.

“The Court, however, received it in evidence subject to the question, whether under the circumstances it ought to have been so received.

“The prisoner was found guilty, and sentenced to be transported for seven years, but execution of the sentence was respited until the said question is decided by the Justices of her Majesty’s Court of Queen’s Bench. There

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was not sufficient evidence to warrant a conviction without the deposition of the said Mary Rowe.

“BALDWIN FULFORD,
“Chairman.”

This case was not argued by Counsel on either side.

WILDE, C. J., delivered the judgment of the Court, as follows:—This prisoner was convicted at the Devon Quarter Sessions of having unlawfully obtained from Mary Rowe a promissory note, for the sum of 50*l.* upon false pretences, when a case was reserved for the opinion of the Judges, and the case states that, upon proof that Mary Rowe the prosecutrix was at the time of the trial so ill as not to be able to travel, her deposition taken before the committing magistrate was read in evidence.

The title or caption of the deposition of Mary Rowe was in the following words: “Devon, to wit.—The examination of Mary Rowe, wife of, &c., taken on oath this 14th February, 1849, at, &c., before the undersigned William Ponsford, clerk, one, &c., in the presence and hearing of Harriet Langbridge, late of, &c., wife of, &c., who is now charged before me for obtaining money, and other valuable security for money, from the said Mary Rowe, then and there being the money of the said W—— S—— Rowe, and the said valuable security for money being the property of Charlotte Rowe.”

The Counsel for the prisoner objected to the deposition being read in evidence, upon the ground that the title or caption of the deposition did not state that the prisoner was charged with unlawfully obtaining money, and valuable securities for money; and therefore that no offence was charged, and consequently the deposition was inadmissible in evidence; and the question reserved for the opinion of the Judges was, whether the objection so taken on behalf of the prisoner was a valid objection, and rendered the deposition inadmissible in evidence.

The Judges (a) are unanimously of opinion that the objection was not valid, and that the deposition was properly received in evidence.

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The objection was, not that the evidence as set forth in the examination did not sufficiently appear to relate to the charge upon which the prisoner was being tried, so as to warn and apprise her of the matter to which her cross-examination should be directed, but only that the title of the examination did not with sufficient distinctness state the charge against her.

The title of the deposition stated the occasion of its being taken, and the matter to which it refers ; and there is no authority requiring any title, or, as it is called, caption, to the examination, and it is sufficient if it be described as the examination of the witness, and that the evidence referred to the charge upon which the prisoner may be upon his trial ; and as no objection was raised that the deposition was defective in that respect, we think the deposition was properly read in evidence.

It may however not be improper to observe, that the case states that the charge preferred against the prisoner was that of obtaining the promissory note and securities by means of false pretences, and that the prisoner was informed of this charge by the committing Justice, and that she had full opportunity of cross-examining the witness.

Conviction affirmed.

(a) The same as in *Pascoe's case*, see p. 141.

THE QUEEN *against* CATHERINE HILL,

IN

THE QUEEN *against* HILL AND OTHERS.

1849.

Saturday,
June 23.

RECEIVING.

An indictment charged the prisoner with receiving certain fowls, knowing them to have been stolen. The fowls had been stolen at M. by the prisoner's husband, and by him sent by coach to B. The prisoner went to the coach office at B., and claimed the hamper (or box) in which they were packed. It was not delivered to her. She was then taken into custody. Held, that the prisoner was improperly convicted of receiving.

“WARWICKSHIRE Quarter Sessions, 12th Mar. 1849. The prisoners were indicted, William Hill and James Hill, for stealing twenty fowls, the property of John Smith; and Catherine Hill for receiving ten fowls so stolen, &c., knowing, &c.

“It was proved in evidence that the prosecutor is a farmer residing at Morton, in the county of Warwick, and possessed at the time of the robbery of a quantity of fowls, principally of the Dorking breed, white, with five toes on either claw. The fowls, to the number of twenty, were stolen from the prosecutor's premises between the evening of the 26th and the morning of the 27th February. On the 28th February, between seven and eight o'clock in the morning, the prisoner James Hill, accompanied by the other prisoner William Hill, brought in a wheelbarrow to an inn at Redditch a box and a hamper, and delivered them to go by the coach to Birmingham. There was no direction affixed to either of them, but the prisoner James Hill, on delivering them, said, ‘A person would call for them at Birmingham.’ The box and hamper were taken to Birmingham the following day, 1st of March, and shortly after the arrival of the coach in Birmingham, the prisoner Catherine Hill came to the coach office and inquired after the box. The box was shown to her by the coachman, and she claimed it as the box she was come for. Upon this she was taken into custody; and, the box being opened in her presence,

was found to contain ten fowls. The fowls were plucked of their feathers, and from the claws of eight of them a fifth toe had been cut away, which was remaining upon the other two fowls. The prisoner Catherine Hill, in answer to the observation of the police constable, that these fowls were believed to be the property of the prosecutor, Mr. Smith of Morton, said: 'They had been sent to her from Stourbridge.' The same day the house of the prisoner William Hill, which is near to Redditch, ten or twelve miles from Birmingham, was searched by two police constables, who found a large quantity of feathers, chiefly white, which appeared to have been recently plucked, and also the entrails of fowls concealed about the house and premises; and the two male prisoners, who were at home in the house, were apprehended. The prisoner William Hill, upon being told by the constables on their first arrival that they were come about Mr. Smith's fowls, said: 'He had not had a fowl on his premises for a fortnight.' The prisoner William Hill is the husband of the prisoner Catherine Hill, and father of the prisoner James Hill.

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"The prisoners were undefended by Counsel.

"The Jury found a verdict of 'Guilty' against all the prisoners; but, the Chairman entertaining some doubt, before the case went to the Jury, whether this indictment could be sustained against the female prisoner as a receiver of goods stolen by her husband, respited the sentence upon her until the next Midsummer Quarter Sessions, in order that, in the mean time, the opinion of the Court above might be obtained whether, upon the evidence, the conviction of Catherine Hill be right or wrong.

(Signed)

"WILLIAM DICKINS,

"Chairman of the Quarter Sessions
of the County of Warwick."

This case was not argued by Counsel on either side.

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WILDE, C. J., delivered the judgment of the Court, as follows :—The prisoner was convicted in March, 1849, at the Warwick Quarter Sessions, of receiving a quantity of fowls, knowing them to have been stolen ; when a case was reserved, which states in substance that William Hill (the husband of the prisoner) and James Hill were convicted of stealing the fowls in question ; and the prisoner was (with them) indicted for receiving the fowls, knowing them to have been stolen ; and the facts stated in the case affecting the prisoner are that, after the fowls had been stolen at Morton, in the county of Warwick, the prisoner's husband sent them in a hamper, without a direction, by a coach to Birmingham ; it being stated that, at the time of the delivery at the coach office, a person would call for the hamper at Birmingham. The hamper arrived at Birmingham, and the prisoner went to the coach office and inquired for it, when the hamper was shown to her by the coachman, and the prisoner claimed it as the parcel she had come for ; upon which she was taken into custody by a police constable, who said to her that the fowls were believed to be the property of Mr. Smith of Morton, and the prisoner said that the fowls had been sent to her from Stourbridge ; and the question is, Whether, upon this evidence, Catharine Hill has been rightly convicted.

The case has been considered by the Judges of the present Court of Appeal (*a*), and we are of opinion that the conviction was wrong, and that, according to the evidence, the prisoner never did, in fact, receive the fowls, nor ever had the power of doing so.

Whoever had possession of the fowls at the coach office, when the prisoner claimed to receive them, never parted with the possession, and the prisoner was immediately taken into custody ; the prisoner, by claiming to receive the fowls,

(*a*) The same as in *Pascoe's case*, p. 141.

which never were actually or potentially in her possession, never in fact or law received them ; therefore, the conviction was wrong.

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Another question was reserved for the Judges, viz., How far the fact of the fowls having been sent to the prisoner by her husband would be urged as a legal excuse for her having received them, although she knew them to be stolen. That question it has been unnecessary to consider, as the prisoner never did, in fact or law, receive the fowls at all.

Conviction reversed.



MICHAELMAS TERM,

IN

THE THIRTEENTH YEAR OF THE REIGN OF VICTORIA.

CORAM

WILDE, C. J.,
 POLLOCK, C. B.,
 COLERIDGE, J.,

ROLFE, B.,
 CRESSWELL, J.,
 PLATT, B.

—
 THE QUEEN *against* MARIA MANNING,

IN

THE QUEEN *against* FREDERICK GEORGE MANNING AND
 MARIA HIS WIFE (a).

Case reserved by the Lord Chief Baron Pollock.

JURY DE MEDIETATE LINGUÆ.

1849.

Wednesday,
 November 7.

“AT the last Sessions of the Central Criminal Court, Frederick George Manning and Maria his wife were jointly indicted for the murder of Patrick O'Connor. Both prisoners pleaded ‘Not guilty;’ but the female prisoner claimed a jury *de medietate linguæ*. She was born at Lausanne in Switzerland, and in the year 1847 was married to the male prisoner, a natural-born subject of this realm. The prisoner’s counsel referred to the stat. 28 Edw. III.

A foreign woman married to a British subject is, by virtue of stat. 7 & 8 Vict. c. 66, s. 16, deprived of her right to a jury *de medietate linguæ*.

(a) Before the prisoners had pleaded an application was made on behalf of the female prisoner for a jury *de medietate linguæ*; the *Attorney-General* objected, and the Court, consisting of Pollock, C. B., Maule and Cresswell, JJ., ruled that the application could not be made until after plea pleaded. After plea the application was renewed, when, upon a statement of the facts, and after discussion, the Court decided against the application. A suggestion of the claim, and the ground of it, were then indorsed upon the record, to which the *Attorney-General* pleaded that she was a natural-born subject. To this there was a demurrer, and joinder in demurrer.

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c. 13, and 6 G. IV. c. 50, s. 47. The *Attorney-General* for the prosecution relied upon the statute 7 & 8 Vict. c. 66, s. 16, and *Barre's case*, Moore, 557. The Judges,—the Lord Chief Baron, Mr. Justice Maule, and Mr. Justice Cresswell, decided that the prisoner was not entitled to a jury *de medietate linguæ*, and the trial of both prisoners proceeded in the ordinary course, and both were convicted.

“The question is, was the female prisoner entitled to a jury *de medietate linguæ*.”

“F. POLLOCK.”

Ballantine (with him *Parry*) for the prisoner, said that she founded her claim upon the statute 28 Edw. III. c. 13, s. 2 (*a*), by which it was enacted, “That in all manner of inquests and proofs which be to be taken or made amongst (*b*) aliens and denizens, be they merchants or others, as well before the mayor of the staple as before any other justices or ministers, although the king be party, the one half of the inquest or proof shall be denizens and the other half aliens,” &c. He then referred to the stat. 6 G. IV. c. 50, s. 47 (commonly called the Jury Act): “Provided always, that nothing herein contained shall deprive any alien, indicted or impeached of any felony or misdemeanor, of the right of being tried by a jury *de medietate linguæ*; but, on prayer of every alien so indicted or impeached, the sheriffs or proper minister shall, by command of the Court, return for one half of the jury a competent number of aliens,” &c. It was upon the first of these statutes that the prisoner made her claim. The second statute is declaratory of the alien's rights under the first statute. The prisoner did not appear before the Court to take advantage of any mere technicality, but to

(*a*) He read from Bac. Abr., Juries, E. 8.

(*b*) The original word here is “entre.”

complain that she had not had a fair trial—a trial before such a tribunal as the law pointed out. It was of no small importance in another point of view. The Act 7 & 8 Vict. c. 66, which it is to be argued, deprived the prisoner of her right, refers to marriages which had taken place before, and which were to take place after, the passing of that statute. A woman marries with the idea that her rights and privileges as an alien will be maintained, and does not suppose that by a statute subsequently to be passed she is to be deprived of her privileges without any act of her own and without her knowledge. Another objection was that the jury process was here supposed to be interfered with by an Act in which the “jury” is never mentioned; if it could have been supposed that the Act would have extended to trial by jury, there would have been considerably more vigilance exercised by the legislature in passing it. What was the intention of the legislature in creating the privilege? The words of stat. Edw. III. were somewhat peculiar, and had been construed differently by different learned authorities. It was, however, to be observed, that it did not draw any distinction between *denizen* and *alien*, but was made applicable to both. In Chitty on Crim. Law (a), it is said, “Besides the ordinary special jury, there is another description of jury which aliens and denizens are by the singular humanity of the law entitled to demand. This is denominated a jury *de medietate linguæ*.” At the time the statute was passed there was not, probably, a very clear distinction between persons naturalized by letters of denization and persons naturalized by Act of Parliament. From this it would appear that both aliens and denizens were so entitled. Looking at the time, therefore, when the stat. Edw. III. was passed,—when no very clear impression existed as to a distinction between a denizen and a naturalized person, it would seem that the inten-

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(a) p. 525.

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tion of that statute was to give foreigners generally the advantage of speaking before those who tried them in their own language, which language might be understood by those addressed (*a*). The term *de medietate linguæ* shows what was intended, and seems applicable to those cases in which prisoners could not convey to the jury their meaning except in their own language. In the subsequent Act the word *denizen* is not used at all; but, construing that Act in the way Mr. Chitty has done, the Court would be induced to say that any person born under a foreign allegiance would be entitled to a jury *de medietate linguæ*. [*Wilde*, C. J.—Does he refer to any authority?] He does not. From the time of Edw. III. it has been the habit for foreigners to claim the privilege of a jury *de medietate linguæ*. In Hale's P. C. (*b*), it is said, "If a person allege that he is an alien he may challenge the array for that cause and he shall be tried by a jury *de medietate linguæ*." But it does not appear that any issue has ever been raised upon the subject. There are no means pointed out by the statute to settle who is and who is not an alien. Nor is there any practice in our Courts in doing so; the only practice is to rest upon the allegation of the party. The words used by Sir Matthew Hale are "upon the allegation;" the words of the statute are "upon the prayer" (*c*). It may be contended that none but an alien or denizen should have such a jury granted; but there is no mode to be found in any of the authorities by which to decide whether the party is or is not an alien; in all other cases of objecting to a jury, a mode of doing so is pointed out. If a foreign name appears upon the indictment it is the practice to ask the party (through the officers of the Court) if he will have a jury *de medietate linguæ*, and if he answers in the affirmative such a jury is awarded as a

(*a*) See note (*a*) p. 166.

(*b*) Vol. II., c. 36, p. 272.

(*c*) See p. 169 *.

matter of course. The *Attorney-General* in reference to this matter when before the Court below said, “(supposing his view to be correct,) if he granted a trial *de medietate linguæ*, it would be a mis-trial:” if so, there must have been many mis-trials, as prisoners were constantly allowed such a trial on their mere allegation. He would submit the *Attorney-General* had no power whatever to place the woman upon the proof of her alienage, her assertion alone was sufficient to entitle her to the privilege. Up to the time of the statute 7 & 8 Vict. c. 66, such a right would undoubtedly have been granted to her, and the question now was whether, by reason of her being indicted with another person, her privilege was by that statute taken away. The *Attorney-General* also relied upon *Barre’s case* (a), which stated that, “upon an information exhibited by the *Attorney-General* against several merchants, some of whom were aliens, and some English, after issue joined the aliens prayed a trial *per medietatem linguæ*; but it was resolved by all the Judges of England that they should not have it: and they likened it to the case of privilege, where one of the defendants demands privilege, and the Court as to his companion cannot hold plea; there he shall be ousted of his privilege.” He had considered that case, and he confessed that he was not able to understand it, nor the application of it to the present case, except that it was there decided that under certain circumstances a prisoner shall be deprived of his right, but what those circumstances were he could not see, and he trusted the Court would not place much reliance upon it. It did not appear what the information was there (b). Perhaps the Court would be of opinion that it was a decision that the party should be ousted of his privilege by reason of

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(a) Moore, 557, ca. 758. He quoted from Bac. Abr. Juries.

(b) The *Attorney-General* observed that every search had ineffectually been made for the information, which in all probability had been burned in the Tower.

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his being indicted with another who could not be so tried. If that was the law, every foreigner might be deprived of his privilege by joining another person, not a foreigner, in the same indictment (a). It is a case in contravention of the stat. of Ed. III., and is not therefore of any authority, nor one upon which the Court could rely. According to the principle of our law there could be no objection to trying the parties separately, and as in this instance it might have been done, it ought to have been done. *Barre's case* is one which never has been relied upon, and one upon which the prisoner ought not to be deprived of her undoubted right under the statute of Ed. III.

He then proceeded to call the attention of the Court to the stat. 7 & 8 Vict. c. 66. By s. 16, it is enacted, "That any woman married, or who shall be married, to a natural-born subject, or to a person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural-born subject." It was clear that she could not be supposed to take *all* the rights and privileges of a natural-born subject, because it supposed the cases the same whether the woman was married to an alien naturalized, or to a natural-born subject. Sect. 6 points out the way in which an alien may be naturalized: it enacts, that upon obtaining a certificate and taking an oath in the form prescribed by the act, he shall enjoy all the rights and capacities of a natural-born subject, *except* that he shall not be capable of enjoying certain privileges and certain rights and capacities: and the preamble of the act is "Whereas it is expedient that the laws now in force affecting aliens should be amended, and that her Majesty should be enabled to grant to aliens the rights and

(a) In Rastell's Ent. 265, is a precedent in trespass against two parties, the one an alien, the other a denizen: they pleaded to issue severally; and a jury *de med. ling.* granted as to the alien, and a jury of denizens to the denizen.

capacities of British subjects, under such regulations and with such restrictions and exceptions as are hereinafter provided." It could not be said that the statute contemplated giving to a foreigner naturalized *all* the incidents which attach to a natural-born subject; he was to have *all* the privileges, subject to certain restrictions and exceptions:—he could not be one of Her Majesty's Privy Council, nor could he be a member of either House of Parliament, nor could he enjoy other privileges which might be specially excepted in his certificate of naturalization; and the privilege given to a married woman (not a British subject), under the statute, must be restrained by the privileges granted to her husband; for she could not, by marrying a naturalized subject, take a greater right than that of such naturalized subject. The words of the 16th sect. are, "Any woman married, or who shall be married, to a natural-born subject, or person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural-born subject." The meaning of the statute, taken altogether, is, that she shall be entitled to certain rights and privileges which attach to a natural-born subject, but not that she shall be deprived of her prior existing rights. The Act was intended to enable parties more easily to become subjects of this country, and not to deprive them of any privileges. Throughout the whole of the Act there was not one word upon the trial by jury. A jury *de medietate linguæ* was a most important privilege: the object being to give a foreigner an advantage equal to that of a natural-born subject before the Jury. A man in being naturalized goes through a certain form, and those privileges which he abandons, he abandons voluntarily; not so with a woman; she marries; no Act of Parliament of this sort is in existence at the time; her privilege remains; but, it is said, that by the subsequent passing of this statute, her privilege is at an end; thus

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taking away a privilege without her consent, and in a manner over which she has no control. He submitted, however, it was a privilege which could not be taken away except by the express words of an Act of Parliament. Yet it was to be contended that in a short Act of Parliament, passed expressly for conferring certain privileges only, and by the same clause in that Act of Parliament by which those privileges are conferred, an intendment was to be made by which privileges were to be taken away. It was important to consider what view the Courts had taken of the position of foreigners in this country. In Com. Dig. (a) it is said, "Though aliens are subject to the laws, and in enormous offences (as murder, &c.) are liable in the ordinary course of justice, yet it may be too harsh to punish them upon a *local* statute;" (he thought the Court would be of opinion that meant *municipal*;) "thus a French prisoner, indicted for privately stealing in a shop, was by the direction of the Judge acquitted of that offence, and found guilty of simple larceny only" (b). [Cresswell, J.—Did you refer to *Foster*? I think there is some observation made on that case. *Attorney-General*.—I believe the observation is that the Judge showed more humanity than discretion (c)]. If the intention of the Legislature in passing the Act of Vict. had been to take away from an alien woman married to an Englishman the right to a jury *de medietate*, he could not help thinking that the 47th sect. of 6 Geo. IV. c. 50, would have been referred to in that stat. in the same manner as the stats. 12 & 13 Will. III. c. 2; 1 Geo. I. sess. 2, c. 4; and 14 Geo. III. c. 84, which were all thereby repealed, so far as they were inconsistent with that statute. The 7 Jac. I. c. 2, did not

(a) Alien, C, 8, 3rd ed. by Kyd. The passage is omitted in the last (5th) edition by Hammond.

(b) *Peter Moliere's case*, Fos. C. C. 188, note.

(c) See p. 165.

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appear to be repealed by that statute, nor did it appear to be repealed at all. By that statute no person can be naturalized, except he shall first receive the Sacrament of the Lord's Supper, and take the oath of allegiance and the oath of supremacy. If a person could be naturalized as it was to be contended this woman was naturalized;—if the provisions of an Act of Parliament could be so repealed, it would be a convenient mode of getting rid of several clauses imposing forms for the protection and safety of a Protestant kingdom. Are persons to be deprived of privileges by a forced interpretation of an Act of Parliament which appears to have no bearing upon the subject; an Act not involving personal rights, but having reference merely to property? Surely not. He submitted that he perhaps had not made out a clear case for denaturalization, but that the *Attorney-General* could not make out a case for depriving the prisoner of the privilege already possessed by her (a).

The Attorney-General (with him *Clarkson*, *Bodkin*, and *Clerk*) appeared for the Crown.—It was perfectly plain that if the prisoner had been tried by a jury *de medietate linguæ*, it would (as against her) have been a mis-trial, nor could it have made any difference that she had consented to such a proceeding. Where a party alleges that she is an alien, and it is not denied, it cannot be taken advantage of as a mis-trial, because it does not appear upon the record; but if it appears that she is not an alien, it would be a mis-trial. [*Coleridge*, J.—If an allegation had appeared upon the record that she was an alien, it would not have been a mis-trial. *Wilde*, C. J.—It would not have appeared that she was an alien; but, on the contrary, that she was not an alien.] Just so. He would take the case in the order of his learned friend. He submitted that *Barre's case* was rightly decided. A foreigner indicted

(a) *Saunders*, who watched the proceedings on the part of the male prisoner, offered no observation.

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with a British subject cannot have a jury *de medietate linguæ*. The abstract of *Barre's case*, read by his learned friend, did not give the case or the reasons of the Judges for their decision. The case was this : It was an information by the *Attorney-General* against *Barre* and divers others, of whom some were aliens and some English, and after issue joined the aliens prayed a jury *de medietate linguæ*. The Court advised with all the Judges of England ; and it was adjudged that they should not have a trial *per medietatem linguæ*. For the English who were joint defendants could not be so tried ; but the aliens could be tried by all English as they might have been before the statute, and as they might have been had they not made the demand for a jury *de medietate linguæ* (a). And they compared it to a case of privilege, where one defendant demands the privilege ; and, as to his companion, the Court could not receive the plea ; therefore the party was ousted of his privilege. Now looking to the question of privilege, in the case of a peer indicted with a commoner, the privilege would be allowed to the peer ; but that did not apply here, because the peer could only be tried by his peers, and the commoner by commoners. For the purpose of understanding the case, it would be as well to look to the stat. 27 Ed. III. st. 2, c. 8. That stat., after making provision for trials by the mayor of the staple, in conclusion provides that if one party and the other be strangers, they shall be tried by strangers ; if one party and the other be denizens, (that means natural-born subjects,) they shall be tried by denizens ; and if one party be denizen and the other alien, one half of the inquest or proof shall be denizens and the other half aliens. That statute, however, does not apply to criminal cases (b). It only provides that, where one party is alien and another denizen, such and such

(a) See note (c), p. 160.

(b) By that statute, all cases of felony, robbery, and maiming are expressly excepted.

is to happen ; and it does not apply where denizen and alien are jointly proceeded against. The next statute is 28 Ed. III. c. 13, s. 2 : that applies where the Crown is a party. It enacts, That in all manner of inquests and proofs which be to be taken or made *amongst* (the word here used in the original is "entre," which he interpreted to mean between) aliens and denizens, half of the inquest or proof shall be denizens and half aliens, and so on. His learned friend was mistaken in the meaning of the word denizen ; it did not mean only denizen by patent, but also denizen by birth. That is plain when we refer to Bro. Abr. (a) "It appears denizens are as well, those who are English born, as those who being aliens are made denizens by letters patent." Then, in pl. 12, he found, "When two aliens are at issue, they shall be tried by all English ; but if denizen and alien at issue, they shall be tried by English and aliens, according to the statute." This also supported the view he took of the meaning of the word "entre" in the statute. The reason for granting a trial *per medietatem linguæ*, is because it is supposed there might be a preference between the parties in the mind of the jury. If it is an issue in civil matters the denizen may claim it if the foreigner will not. In Bac. Abr. (b) to *Moliere's case*, (cited on the other side,) there is this note : "In this case a learned writer (c) observes, the humanity of the Judge was at least more conspicuous than the soundness of the principle as a mere point of law." No doubt, that is an authority which cannot be supported ; for immediately a foreigner comes into this country he becomes subject to the laws of this country. But *Barre's case* is an authority directly in point. The statute of Ed. III. was expressly repealed by the Jury Act (d) ; by s. 62 it repeals so much of a statute as

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(a) Denizen and Alien, pl. 4. See also 2 Haw. P. C. 579, book 2, c. 43, s. 39, in reference to this statute.

(b) Aliens, C, 2.

(c) 1 Wooddes. 382.

(d) 6 Geo. IV. c. 50, s. 62.

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directs how all manner of inquests and proofs shall be taken between aliens and denizens : but there is, in s. 47 of the same statute, a re-enactment of the privilege as it existed under the stat. of Ed. III. It has always been a mistake to say, of the term *de medietate linguæ*, that it would import that one half of the jury should be of the district from which the prisoner came ; it is sufficient if the jury consist half of foreigners wherever they may come from, or in the words of the old act “*estrangères* ;” so that a Frenchman might be tried by a jury half Russians or Germans (*a*). It is said there is no allusion in this statute to the Jury Act. By 1 & 2 P. & M. c. 10, s. 7, it is enacted, that “all trials for treason shall be had and used only according to the due order, and course of the common laws, and not otherwise ;” no reference is there made to the Jury Act, and yet it is held that a foreigner is by that statute ousted of a jury *de medietate linguæ* (*b*). It is said that the privilege, not being noticed in the statute, cannot be said to be taken away. By s. 16 of 7 & 8 Vict. c. 66,

(*a*) See 2 Haw. P. C. 580, book 2, c. 43. s. 42, where it is said, referring to Dyer, 144 ; Rast. Ent. 7, 159, 264 ; “Note, that some of the precedents for the award of a *venire* of a jury of half denizens and half aliens in pursuance of 28 Ed. III. mention, that the aliens shall be of the same country whereof the party alleges himself ; and others direct (Rastal, 265 ; 10 Co. 104) generally, that one half of the jury shall be aliens, without specifying any country in particular. And this form seems most agreeable to the statute, which speaks of aliens in general ; and it seems to be confirmed both by late (3 St. Tr. 3) practice, and the greater number of authorities (S. P. C. 158, B, Denizen, 4 B, Pannel, 3 ; Bon. F. Tr. 30, by five Judges against one).”

See also, in Dyer, 304 *a.*, where a Scotchman prayed a jury, *de m. l.* ; and one ground of refusal was, that the Scottish language is not a *strange tongue*, but mere *English* (see qu. to this in Haw. P. C. 580, book 2, c. 43, s. 41). Solomon de Stanford, a Jew, had a cause tried before the Sheriff of Norwich by a jury which were “*sex probos et legales homines, et sex legales Judæos de civitate Norwici, &c.*” (Pasch. 9 Ed. I.)

See also *Keniger v. Forgossa*, Plow. 2 (4 Ed. VI.). The number of precedents is certainly in favour of a jury of half aliens of the same country with the party making the prayer ; and more so, if we take into consideration the cases before 28 Ed. III., in which the parties were granted the privilege by charter from the Crown.

(*b*) See Bac. Abr. Juries, E, 8, 7th ed. (Gwillim & Dodd), 569.

“ Any woman married, or who shall be married, to a natural-born subject or person naturalized, shall be deemed and taken to be herself naturalized.” And, by s. 15, it is enacted that nothing in that statute shall be construed to take away certain rights or privileges of aliens, so far as they relate to real or personal property. So that it was foreseen that the statute would operate to take away as well as to confer rights, and therefore the rights in sect. 15 were expressly retained; but no reservation is made of the right to a jury *de medietate linguæ*. [Wilde C. J.—It is laid down in Coke (a) that naturalization cannot be upon condition, but that it must be absolute.] A man may acquire a certain status in a foreign country by naturalization, but he cannot throw off his original one: with a wife it is not so; she takes all the properties of naturalization. The question here really is—Is a person naturalized an alien? In Com. Dig. (b), under “ Who is not an Alien?” is the answer, “ A person naturalized;” and it is said, “ If an alien be naturalized, he shall be to all intents as a natural subject.” According to Lord Coke (c), naturalization is larger than denization; if a denizen by patent

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(a) See Co. Lit. 129 a. “ An alien naturalized must be by Act of Parliament. And this alien naturalized is to all intents and purposes a natural-born subject, and differeth much from denization,” &c. See also *Ib.* 8 a.; and Bac. Abr. Alien, B.; Vaugh. 284.

(b) Alien, B, 2.

(c) Co. Lit. 129 a. “ A person naturalized in England is the same with a person born in England ” (*Craw v. Ramsey*, Vaugh. 287); that is (subject to the stat. 12 W. III. c. 2, and any disability which may be imposed by his bill of naturalization), he stands in the same relation to the rest of the community as if he had been born in England; but he does not become a natural subject, “ for a *natural subject* and a *natural prince* are relatives, and if an Act of Naturalization should thereby make a man a natural subject, the same subject would have two natural sovereigns—one when he was born, the other when he was naturalized, which he can never have, more than two natural fathers or two natural mothers, except the sovereigns be subordinate, the inferior holding his kingdom as liege homager from the superior.” (Vaugh. 283.)

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cannot have the privilege much less can a person naturalized. Is any but an alien entitled to the privilege?—No. Who is an alien (*a*)? Clearly not a person who has been naturalized. That which is given by statute may be taken away by statute. He relied upon the statute. It was further to be observed, in Dyer (*b*), that even though the foreigner pray a jury *de medietate linguæ*, and he do not have it, it is not error. [*Platt*, B.—If your position be correct, how do you explain why the words, “and have all the rights and privileges,” &c., were added? *Cresswell*, J.—It might have meant that she was to have all the rights of a natural-born subject, and not those of her husband alone.] The wife is to have all the rights which as a woman she can have, and that her rights are not to be curtailed by any reference to her husband. The object of the Legislature was to give the woman every possible right; but, even if that were not so, we are not to speculate upon the meaning of the words. If in the statute they chance to repeat words twice over, it is no reason why the effect of them if only once stated should be invalidated.

Ballantine, in reply, submitted that, had the woman been tried by a jury *de medietate linguæ*, it would not have been a mis-trial, nor would there have been any error upon the record. He was at a loss to see in what manner the question could be raised: she claimed her right as an alien; that would appear upon the record, and he could not conceive how the trial could have been invalidated. There was an expression, in Dyer (*c*), to which he should have called attention—“when the matters of an *alien born* are in trial”—as if the birth was a matter not to be overlooked. A woman can never get rid of the allegiance which she owes

(*a*) See Bro. Abr. Denizen and Alien.

(*b*) 28 *a.*; and see *Symons v. Spinosa*, *ib.* 357 *b.*

(*c*) 28 *a.*

to the country where she was born ; she cannot therefore be entirely, and to all intents and purposes, naturalized, and therefore cannot be deprived of those privileges which she possessed as an alien-born. The statute is expressly for giving privileges, and cannot therefore be consistently applied for the purpose of taking them away. In *Barre's case* the objection seems to have been taken after issue joined (a); and it may have been upon this ground that the case was decided.

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(a) In earlier times, the Courts appear to have been somewhat less strict than in later days, as to the time at which a jury *de medietate linguæ* should be prayed.

In 21 H. VII. [32 b. pl. 23], an alien, S., a Lombard, was sued, and they were *at issue*, and no request had been made of a trial *per medietatem linguæ*, but a *general venire facias* awarded; and, at the *distringas juratorum*, the plaintiff for expedition (lest he should be delayed by *challenge* *) showed the matter and prayed a *supersedeas* to the Sheriff to stay it, and a new *ve. fa. de med. ling.* according to the statute, and he had it. In Staunf. P. C. lib. 3, p. 159, it is said, that where the plaintiff is an alien and the defendant denizen, the prayer of *med. ling.* must be before the *venire facias*, otherwise the party shall be put to purchase a writ ("briefe") out of Chancery, in order that it may be allowed. But, if the defendant is alien and the plaintiff denizen, the law will allow it to him as well after as before the *venire facias*. (See also, Fitz. "Trial," 71.)

In debt on bond (*Symons v. Spinosa*, Dyer, 357 b, pl. 45 [19 Eliz.]) the defendant at the trial prayed a jury *de m. l.*; and it was held that he should have done so before the awarding of the *venire facias*, according to precedents; notwithstanding the case of 21 H. VII., and although he was tried by a jury of denizens, it was held good. See also Cro. Eliz. 818 [43 Eliz.], *Ib.* 869 [44 Eliz.].

In the last case, it appeared upon the record that the party was *mercator extraneus*; and this was said not to be material, because the defendant [or plaintiff], in whose advantage the *de med. ling.* should be awarded, did not except to the *venire facias* at the awarding of the writ, nor prayed that it might be awarded *de med. ling.*; and the Court without his prayer could not take consance that he was *alienigena*. See also Dyer, 27 b, pl. 180; Plow. R. 2, note; 2 Roll. Ab. 643, "Trial" (P).

In Dyer, 304 a, pl. 51 (an indictment), the *venire* was awarded, the pannel returned, and three of the jury sworn, before prayer made. And here it was said that he could not have his jury *de m. l.* [not because the *venire* was

* The party must pray it, and cannot object by way of challenge. Staunf. P. C. 158; and see stat. 6 Geo. IV. c. 50, s. 47.

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WILDE, C. J.—I need hardly say that from the time this case came into the hands of the Judges it has received

awarded and some of the jury sworn] but [*inter alia*] “because he had passed the advantage by the general issue.” If by this it is meant he had already put himself upon the country by his plea, and therefore was estopped of his prayer, it is at variance with Dyer, 357 *b*, and the other cases cited; and if it be law, and upon such ground; it would operate to deprive every alien of a jury *de m. l.*, because the prayer at the earliest cannot be before the plea, and by pleading the general issue the prisoner is, by stat. 7 & 8 Geo. IV. c. 28, s. 1, deemed to have put himself upon the country; and the previous practice of asking the prisoner “How will you be tried?” is no longer pursued.

The case, in Dyer, 304 *a*, is also reported in Jenk. cent. 6, ca. 20; and the only reason there given for the decision is “for that he ought to have prayed it so that the sheriff might have known what jurors to return.” This certainly is more intelligible. In *Vangangell v. Browning* (Keb. 547), it is said, “If the defendant be an alien, on notice given by his attorney to the plaintiff or his attorney, the plaintiff ought to enter it on the roll, to have trial *de med. ling.* at his peril; but the Court refused to award it for the defendant, on his affidavit that he is an alien.” In *The King v. D'Eon*, (Bla. 509,) the *Attorney-General* filed an information against the defendant for a libel; on the 29th June he pleaded the general issue; on the 9th July he was tried. In a note by the learned reporter it is said, “It was expected the defendant might have challenged the array for want of jurors *de m. l.*; but it was conceived such challenge would have been too late, unless he had prayed such jury by a suggestion on the record that he was a foreigner at the time of awarding the *venire*.” And this view is sanctioned in a note in Pl. Com. 2 (*Reniger v. Fergossa*). “The *med. ling.* must be prayed before the general *venire* is awarded, or at least before it is returned and filed, or else the party has surceased his time; and this holds as well where the defendant is an alien as the plaintiff.”

It would seem therefore, from the above authorities, that issue having been joined is not an objection to granting a prayer, subsequently made, of a jury *de m. l.*

A question then arises, whether the prayer may be made before the award of the *venire*.

The cases cited 21 H. VII.; Dyer, 357 *b*.; Cro. Eliz. 818; Cro. Eliz. 869; Keb. 547; and from which it would appear that the prayer must be before the *venire*, were civil causes, the practice in which is to be distinguished from that in criminal cases. The case, in Dyer, 304 *a*, is a criminal case, and is to the same effect. Then we have the note in Blackstone and that in Plowden, which do not really decide this point at all.

Some confusion may exist as to the time of the issuing of the *venire*. A general *venire* or *precept* (see form 2 Hale, P. C. 32) ought (Hale, P. C. 34) to be issued to the Sheriff by the Justices of gaol delivery before the assizes (*semble*, six days at least, 4 & 5 W. & M. c. 24, and 7 & 8 W. III. c. 32), tested in the name of the Queen, or in the name of the Justices (Hale,

their anxious attention; not, for the purpose of prematurely forming an opinion; but, in order that they might be fully enabled so to apply their minds to the

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P. C. 33); and by the commissioners of *oyer* and *terminer* under their seals, fifteen days before their session, to return twenty-four jurors * to try the issue between the Queen and the prisoners to be arraigned; yet this is but preparatory, and to have a jury in readiness;† for after the prisoners arraigned and pleaded to the country, a precept *ought* to issue to the sheriff in nature of a *venire facias* (see 4 Blk. Com. 344; 2 Hales, P. C. 264; 2 Haw. P. C. c. 41), which may bear test the same day that the prisoner pleads, commanding the sheriff to return twenty-four, &c., to try the issue upon the same day that the prisoner pleads, viz., *ad horam primam post meridiem*, &c., or upon a future day, and this precept must be in the names and under the seals of the commissioners, or three of them, whereof one of the *quorum*, and not barely by an award upon the roll (Hales, P. C. 260, 261). The question cannot turn upon the first-mentioned precept or *venire*, for that would frequently happen before even the offence committed. Is it then before the last-mentioned *venire* that the prayer must be made? “Justices of gaol delivery, of *oyer* and *terminer*, and justices of peace, after the prisoner hath pleaded, may take his panel from the sheriff without making any precept to him (Hales, P. C. 261; 2 Haw. P. C. c. 41, s. 1, p. 561‡). And it has now become the general practice for the clerk of the Court to call the jury returned by the sheriff into the box without any communication with the Judge upon the subject.” It cannot therefore be before the latter *venire*, which seldom or never issues, that the party must make his prayer. When then is the prayer to be made? “If upon an indictment of felony against an alien, he plead *not guilty*, and a common jury be *returned*, if he doth not *surmise* his being an alien before any of the jury sworn he hath lost that advantage (Dyer, 304 a), [certainly not a satisfactory authority on the point,] but if he allege, that he is an alien, he may challenge the array for that cause, and thereupon a new precept or *venire facias* shall issue, or an *award* be made of a jury *de m. l.*, (21 H. VII. 32 b); but it is more proper for him to surmise it upon his plea pleaded, and thereupon to pray it.”

It has been decided in an *action of ejectment* that the return of the *venire*

* Forty-eight jurors (4 Blk. Com. 344). Not less than forty-eight nor more than seventy-two (3 G. II. c. 25). In practice the numbers vary, regard being had principally to the amount of population within the jurisdiction. At the Central Criminal Court, the precept is to return a “competent” number.

† If the jurors be challenged until sufficient do not remain, a new panel may be ordered *ore tenus*: on a charge of treason, it appears, the Court should adjourn in order that the prisoner may have a copy of the new panel in due time, (pursuant to stat. 7 Will. III. c. 3,) otherwise a new panel might be ordered returnable *instantly* (Fos. C. L. 64). It would therefore appear that in cases other than treason, it may be so ordered without any adjournment.

‡ It is said to be otherwise, if they have a special commission (2 Haw. P. C. 41, s. 1, p. 561, note (b)).

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arguments as to arrive at a proper conclusion. Each of us having attended to the case, and particularly to the arguments of the counsel for the prisoner, (who, it appears to me, urged every thing most ably that could be urged in her behalf,) we are unanimously of opinion that the objection cannot be sustained ; and, that the party was properly tried by the Jury which was empanelled on the occasion ; and we are also all of opinion that it is unnecessary for the purpose of coming to a just, and proper, conclusion on the question, to enter upon many of the topics which have been, not improperly, introduced in the course of the argument.

The question is simply this ;—Was the prisoner an alien at the time of the trial ? if she was, then she was entitled to that which she prayed ; if she was not an alien, but a British subject, then she was not so entitled. Now the effect of an Act of Naturalization has not been questioned, and it is hardly to be expected that it should be, for it is clearly laid down by Lord Coke, by Lord Bacon, by Sir Matthew Hale, by

de med. ling. ought to show which of the jurors are aliens and which denizens, and they ought to be sworn upon the jury one denizen and one alien, and so another denizen and another alien, in their turns ; but if otherwise, it is a misreturn, and only aided by stat. 18 Eliz. c. 14, (Cro. Eliz. 841, 818 ; and see Ib. 305,) intituled, *An Act for Reformation of Jeofails*, which enacts, “That if any verdict of twelve men or more shall be hereafter given in any *action, suit, bill, plaint, or demand*, in any Court of Record, the judgment shall not be stayed or reversed by reason of any default, &c., &c.; but by the second sect., the statute shall not extend to any writ, declaration, or suit of appeal of felony or murder, nor to any indictment or presentment of felony, murder, treason, or other matter, nor to any process upon any of them, nor to any writ, bill, action, or information upon any popular or penal statute ; anything to the contrary notwithstanding” (see 2 Hale, P. C. 193). It would therefore appear, that it *must* be so in criminal cases.

Where the Sheriff returns twelve for aliens, of whom even six are not really aliens, *semble*, the party may challenge the array (2 Rol. Ab. 643, P. pl. 2).

An alien shall not have a *tales de med. ling.*, unless the first *venire facias* were so (3 Ed. IV. c. 116, pl. 3 ; 1 Keb. 547). A *tales de circumstantibus* may be awarded on a trial *de med. ling.* for *so many* (10 Rep. 105 *a*) as shall be wanting (Cro. Eliz. 305 ; 10 Rep. 104 *a* ; Haw. P. C. bk. 2, c. 43, s. 45).

It seems agreed that there is no need that any of those who find an indictment against an alien should be aliens (2 Haw. P. C. 579).

all the text writers, and by all the Editors of Blackstone, (indeed, it is a proposition universally adopted,) that a person naturalized becomes to all intents and purposes as a British-born subject. That proposition is not at all impugned, nor its correctness in any degree impeached by the fact, that in naturalization acts certain disqualifications are introduced; because, it is competent for the Legislature to impose restrictions upon individuals which do not extend to British subjects generally. The Royal Marriage Act (a) imposed certain disqualifications upon British subjects; and various other Acts of Parliament disqualify individuals from holding certain offices, and from exercising certain rights. In *Rex v. De Mierre* (b) the question arose upon a Naturalization Act, whether a person thereby naturalized was liable to serve the office of constable; the statute declaring that the party should be adjudged, and taken, to all intents and purposes, to be naturalized, and, as a free-born subject of this kingdom; but it also provides, that the party should not take any office, or place of trust, either civil or military; and in respect of such disqualification, the party was held not liable to serve the office, it being one of trust. Now, the question here, is, What was the *status* of the prisoner at the time of trial? The section of the Act of Parliament referred to, says, that a woman who marries a natural-born subject shall be deemed, and taken to be herself naturalized, and have all the rights, and privileges of a British subject. If this be so, what are the rights of a British subject? British subjects may be subject to certain disqualifications; but, I know of no instance in which the character of an alien and a British subject are united. The disqualifications are not such as arise from alienage after naturalization, but such as are imposed, by the authority of Parliament, upon par-

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(a) 12 Geo. III. c. 11.

(b) 5 Burr. 2788.

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ticular individuals. If therefore the effect of the Act of Parliament is to make the party to all intents and purposes a British subject, as it appears to be upon the authorities to which I have referred, and also from the very learned judgment in 1 Vent. (b); if that be so; is there anything in the present Act of Parliament to qualify the general enactment, that the party shall be deemed and taken to be naturalized? One part of the argument is that the statute was intended to give rights and not to take them away: what is the ordinary effect of every Naturalization Act? It is to give, and not to take away. The argument urged in the present case might be used upon every Act of naturalization, because, in none of them is it said, that the statute should operate upon the trial by jury; they merely confer certain rights by naturalization; that the party shall be taken and deemed to be a British subject. What does the statute give? It gives all the rights of a British subject. What does it take away? All that does not belong to a British subject. It makes the party, *ipso facto*, to all intents and purposes a British subject. The argument attempted to be drawn from other parts of the Act of Parliament appears to be, that if a woman marries a man naturalized in a particular way, she may, by the construction contended for on behalf of the Crown, acquire a different *status*, and be entitled to different rights from her husband. Very likely.—If the husband in being naturalized was placed under certain disabilities: he is not the less a British subject because of those disabilities, nor can that fact be taken to qualify a distinct substantive enactment, by which the wife is naturalized without any qualification whatever. The clause is general in its terms, that the party

(a) *Qy.*, Per Sir Matthew Hale, C. B., in *Collingwood v. Pace*, 1 Vent. 418.

shall be deemed and taken to be herself naturalized. The first argument therefore fails. The next argument is, that the introduction of the words "and have all the rights and privileges of a natural-born subject," must be considered as qualifying the previous enactment. But it is not putting a proper construction on those words, to say that although they were introduced to enlarge, they operate to lessen the political status of the party; that is not a just conclusion. Whether these words were introduced in pursuance of a general practice, the Legislature adopting an ordinary phraseology by which all rights resulting from a certain position are introduced, or whatever may have been the intention, it appears to us that they can have no such operation as that contended for on behalf of the prisoner in the present instance. You are to collect the interpretation of the Act, not by travelling out of the Act, but by looking to the Act itself; by reading the whole, and applying the general tenor to the construction of a particular section. What was the general intention of the Act? It was to make the woman a British subject; and I find no words in the Act which will warrant the conclusion that it intended to enlarge, or diminish, what belongs to the status of a British subject. It does not refer to the Jury Act any more than any other Naturalization Act refers to the Jury Act. Those Acts of Parliament content themselves with giving to parties the status of British subjects, and then, in express terms adding to the character of a British subject any disabilities which it may be thought wise to add, with regard to the particular individual. With respect therefore to this person, we cannot discern any intention in the Act of Parliament to do more or less than to make her a British subject; if that be so, the whole question is at an end; she was not an alien at the time she was tried, but a British subject, and therefore she was not entitled to any

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other than a British jury. The Judges limit their view to the construction of this Act of Parliament as combined with previous Acts, and their construction is, that a woman who marries a British subject becomes a British subject to all intents and purposes, and therefore that this person has been properly tried, and there is no ground for the objection.

Conviction affirmed.

CORAM

POLLOCK, C. B.,
COLERIDGE, J.,ROLFE, B.,
CRESSWELL, J.,

PLATT, B.

THE QUEEN *against* HENRY HARRIS.*Case reserved by the Honourable Baron Platt.*

PLEADING.

“HENRY HARRIS was convicted before me at the last Gloucester assizes, upon an indictment charging that he upon his examination under a fiat in bankruptcy issued against him did not discover when he disposed of certain real property of which he had been possessed with intent to defraud his creditors.

“The fiat issued on the 11th November, 1843. The prisoner at the time of his bankruptcy was possessed of an equity of redemption in land and houses which he had mortgaged, and also of land and houses which were incumbered.

“In December, 1843, or January, 1844, he executed a deed dated the 4th April, 1842, purporting to convey on that day all his interest in the above-mentioned property to his children; and, on his examination, which began on the 3rd January, 1844, and ended on the 1st March of the same year, he stated he had disposed of his interest in the property on the day on which that deed bore date.

“The indictment, after stating the trading, petitioning

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*Wednesday,
November 7.*

An indictment under the stat. 5 & 6 Vict. c. 122, s. 32, charging a bankrupt that “at the time of his examination, to wit,” &c., “he was possessed of a real estate, to wit,” &c., and “that he, at the time of his said examination,” &c., “did not discover when he disposed of, assigned, and transferred the said estate,” &c., without averring that the bankrupt had disposed of, assigned, or transferred the said estate, &c. Held insufficient.

Qy. Whether an indictment under the same statute, charging that the bankrupt “submitted himself to be examined,” &c., and “that at the time of his said examination,” &c., sufficiently alleges that the bankrupt *was* examined.

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creditor's debt, act of bankruptcy, the fiat, and the adjudication of bankruptcy under it, proceeded thus:—

“ And the jurors aforesaid, upon their oath aforesaid, do further present that the said Henry Harris, late of the city and county of Bristol, shoemaker, dealer and chapman, afterwards and within the time limited by law in that behalf, to wit, on the day and year last aforesaid, at the city and county of Bristol aforesaid, surrendered himself to the said district court authorized to act in the prosecution of the said fiat, and was then and there, as last aforesaid, duly sworn before the said Richard Stephenson, he the said Richard Stephenson acting as such commissioner, having then and there lawful and competent authority to administer the said oath, and duly submitted himself to be examined before the said court. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Henry Harris, at the time of his said examination, to wit, on the day and year last aforesaid, was possessed of a certain real estate, to wit, all that plot, piece, or parcel of ground, hereditaments, and premises situate in the parish of Christchurch, in the said county of Monmouth, &c., &c. (describing the real property), and then charged that the prisoner at the time of his said examination, and being so sworn as aforesaid, then and there feloniously did not discover when he disposed of, assigned, and transferred the said real estate of him, the prisoner, being such bankrupt as aforesaid, the same not having really and *bonâ fide* before then and before the time last aforesaid been sold and disposed of in the way of the trade of the said prisoner, or laid out in the ordinary expense of the family of the said prisoner, with intent then and thereby to defraud the creditors of the said prisoner, against the form, &c., &c.

“ *Huddleston* (with him *M'Mahon*) moved to quash the indictment, and, after the conviction in arrest of judgment,

contended (a) that the indictment should have contained two distinct allegations.

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“ 1st. That the prisoner was examined.

“ 2nd. That the prisoner had, in fact, disposed of the real property ; and that the absence of either of those allegations rendered it substantially defective. At the close of the case for the prosecution he *also contended (a)* that the indictment was misconceived, for that the prisoner had on his examination stated a time at which he alleged he had disposed of the property. I overruled the *first and second objections ; and, as to the second objection (a)*, held that if the prisoner, on his examination, falsely, and with intent to defraud his creditors, swore that he had conveyed the property to his children on the 4th April, 1842, he did not discover it within the meaning of the Act (b).

(a) The case, as originally submitted to the Judges in Easter Term, stated, “ Huddleston *demurred*, and thereupon contended,” in lieu of the words now standing before the word “ that,” and the words “ also contended,” in the present case were substituted for the words “ further contended,” and the words “ first and second objection, and as to the second objection,” were substituted for “ demurrer and.” When the case so stated came before this Court, in Easter Term, before Wilde, C. J., Alderson, B., Wightman, J., Cresswell, J., and Platt, B.,

Huddleston (with him, *M'Mahon*) appeared for the prisoner. (Wilde, C. J., “ What authority have we to hear you in this case ? You can hardly call a case reserved which has been determined upon demurrer.”) The demurrer was withdrawn. (WILDE, C. J.—Our judgment must be upon the case which states that the demurrer was determined.)

It was then ordered that the case should stand over.

The case was again, in Trin. T., brought before this Court, composed of Lord Denman, C. J., Parke, B., Patteson, Coltman, and Williams, JJ., when it was sent back to be restated ; Lord Denman, C. J., observing, “ I have a great objection to any alteration in the statement of facts, and I hope such a circumstance will not take place again.”

Reg. v. Jesse Appleton.—*Vaughan* (before the same Court) stated that this case was open to the same objection as *Reg. v. Harris* ; it came before the Court upon a demurrer to a plea of *autrefois acquit*.

Lord Denman, C. J.—“ It has already been decided that the Courts have not the power to reserve a question in this way.”

(b) 5 & 6 Vict. c. 122, s. 32.

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“The case went to the jury, and the prisoner was convicted on the merits. But I may have been mistaken in overruling the two objections raised by counsel, and the success of any one of them would have defeated the prosecution.

“I have thought it more safe to reserve them for further discussion, and submit them to the consideration of the Judges.

“T. J. PLATT.”

Huddleston, for the prisoner. This was an indictment under the stat. 5 & 6 Vict. c. 122, s. 32 (a), which section, amongst other matters, enacts, “That any person who shall be adjudged a bankrupt, and who upon such examination

(a) And be it enacted, That if any person adjudged bankrupt after the commencement of this Act shall not, upon the day limited for the surrender of such bankrupt, and before three of the clock of such day, or at the hour and upon the day allowed him for finishing his examination after notice thereof in writing to be left at his usual or last known place of abode or business of such person, or personal notice in case such person be then in prison, and notice given in the London Gazette of the issuing of the fiat, and of the sittings of the Court authorized to act in the prosecution of the fiat against him, surrender himself to such Court, and sign or subscribe such surrender, and submit to be examined before such Court from time to time upon oath; or if any such bankrupt upon such examination shall not discover all his real and personal estate, and how and to whom, upon what consideration and when he disposed of, assigned, or transferred any such estate, and all books, papers, and writings relating thereunto (except such part as shall have been really and *bond fide* before sold or disposed of in the way of his trade, or laid out in the ordinary expense of his family); or if any such bankrupt shall not upon such examination deliver up to the said Court all such part of such estate, and all books, papers, and writings relating thereunto as shall be in his possession, custody, or power, (except the necessary wearing apparel of himself, his wife, and children,) or if such bankrupt shall remove, conceal, or embezzle any part of such estate to the value of ten pounds or upwards, or any books of account, papers, or writings relating thereto, with intent to defraud his creditors, every such bankrupt shall be deemed guilty of felony, and be liable to be transported for life, or for such term not less than seven years as the Court before which he shall be convicted shall adjudge, or shall be liable to be imprisoned with or without hard labour in any common gaol, penitentiary house or house of correction, for any term not exceeding seven years.

(as is therein mentioned) shall not discover all his real and personal estate, and how, and to whom, and upon what consideration, and when he disposed of, assigned or transferred any of such estate, shall be guilty of felony." It was important to look to the first part of that section to ascertain the meaning of the word "such:" it is there enacted, that if any person adjudged a bankrupt shall not at certain times, limited for the surrender of the bankrupt, and after certain notices, surrender himself, and submit to be examined before such Court from time to time upon oath; or if upon *such* examination, &c., he should fail to discover his real estate, he was then liable. There were two objections to this indictment.—First, that it is nowhere stated upon the face of the indictment that there was at any time an examination. The words in the indictment are, "at the time of his examination he did not discover"—and the only allegation is that on the day, &c., he surrendered himself to the District Court, and was then and there duly sworn, and submitted himself to be examined; but it nowhere states that he was examined. At the trial it was sought to get rid of the objection by getting rid of the word "said"—"of his said examination." He apprehended that word was important and ought not to be rejected; if so, looking back from the word "said" the Court would find that no examination was previously stated: that "he submitted to be examined," is clearly not an allegation that he was examined; that would appear to be completely decided by *Rex v. Page* (a), which was a case upon the stat. 5 Geo. II. c. 30, s. 1; that statute contains precisely the same words as the statute upon which this indictment was founded. There it was held, that when a bankrupt refused to answer any questions put to him, it was not such an examination as was necessary, in order to render the party subject to the charge of felony within the statute. That

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(a) 1 Bro. & Bing. 308; S. C. 7 Price, 616; 3 Moore, 656.

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case therefore shews a clear distinction between a submitting to be examined and an examination; the distinction is also evident from the words of this statute. [*Pollock*, C. B.—Your argument is that he was sworn; but it does not appear that any question was put to him: was he therefore under such circumstances bound to state these matters?] That is precisely the question. [*Pollock*, B.—If the question is put to him, whether he has any estate? and he says No,—that is an examination.] A bankrupt is not like an insolvent: an insolvent has to prepare his schedule, and he is bound to disclose all his estate upon the face of it; not so with a bankrupt, the disclosures in his case are to be the result of the questions which may be put to him; this was apparent from the form of the oath administered to him. [*Coleridge*, J.—Does the statute give the form of the oath?] It appeared not, he had not been able to find anything of the sort. There were thirty days between the examinations, and it did not appear that the prisoner underwent the last examination at all. *Rex v. Walters* (a), was an indictment for the same sort of offence as that for which the present party is indicted. At the trial of that case it appeared that the final examination of the bankrupt had never been completed, and that it was adjourned *sine die*; and Park, J., in giving judgment, says, “Even if the prisoner had concealed these books” [which he was charged with concealing, but which was not proved], “I am of opinion that he is not indictable till after he has concluded his last examination; till then he has a *locus pœnitentiæ*. How do we know that when he goes to complete his last examination, he will not deliver up all his books correctly? The prisoner must be acquitted.” Here it says, at the time of his examination he did not discover,—which examination? It does not appear that he had passed his last examination: and if he

(a) 5 C. & P. 138.

had not he was not indictable, upon the authority of *Rex v. Walters*. He may have undergone no other examination than that of having been simply asked, Are you the bankrupt? to which he may have answered, No. No further question may have been put to him, and upon this, for all that appears, he may have been indicted. Again, the words of the Act are “upon the examination;” in the indictment the allegation is “at the time of the examination;” that is not equivalent to the word “upon:” for this he was not without authority. In *Reg. v. Bartholomew (a)*, which was an indictment for perjury, the indictment merely stated, that “at the time the said C. B. swore as aforesaid, it was material and necessary for the said T. S. so being such Justice as aforesaid, to inquire,” &c.; and it was objected, in arrest of judgment, that the averment of materiality contained in the indictment was insufficient, and *Alderson, B.*, in giving judgment, after conferring with the other learned Judges, says, “It is not stated that it was a material and necessary question in the inquiry before the said T. S., to which you gave the false and corrupt answer,” &c.; and the judgment was therefore arrested. The words there used were the same as they are here; the allegation “at the time” does not point to the occasion, but merely to the period; he also referred to *Rex v. Stevens (b)*.

The second objection is, that upon the face of the indictment the allegation that he had disposed of his property is repugnant. It is alleged that, at the time of his said examination, he was possessed of a certain real estate; and that at the time, &c., he did not discover when he disposed of it: it does not state that he had disposed of his estate; this certainly should have been stated, in order to render the indictment sensible; as it stands it is perfectly insensible. In *Haw. P. C. (c)*, it is said “that it is a certain

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(a) 1 C. & K. 366.

(b) 5 B. & C. 246.

(c) Book 2, c. 25, s. 62, 8th ed. by Curwood.

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rule, that where one material part of an indictment is repugnant to another, the whole is void; for the law will not admit of such nonsense and absurdities in legal proceedings, which, if suffered, would soon introduce barbarism and confusion. Also it takes off much from the credit of an indictment, that those by whom it is found have contradicted themselves." He also referred to Com. Dig. (a); Stark. Cr. Pl. (b); and Haw. P. C. (c). [*Pollock*, C. B.—It is consistent with this declaration, that when he came before the commissioners to be examined, he took the oath and declined to answer a single question; or that the party may not have been sufficiently examined.] That is the third objection. [*Cresswell*, J.—He may have been asked how he disposed of his property; and if he never had the property, how could he answer the question?]

W. H. Cooke, contra.—It would be enough for him to satisfy the Court that in this indictment sufficient was stated to make known to the person indicted the offence with which he was charged. If an offence is so stated that a person of ordinary understanding may know the offence with which he is indicted, that is sufficient. The present is the form which appears to have been in use from the remotest times. In the case of *Rex v. Page* (d), as reported in Moore, and also in Price, the form of the indictment is not given. In *Rex v. Bullock* (e), the form of the indictment seems to have been the same as in the present case; and there no objection was taken that there was no special averment that the party was a bankrupt. [*Pollock*, C. B.—That was upon a different statute.] The statutes are in nowise altered. [*Pollock*, C. B.—Bullock was charged with concealing.] All that the statute imposes is

(a) Indictment, (G 3).

(b) p. 234.

(c) Book 1, c. 64, s. 39, in the 2nd vol. of edits. of 1787 and 1795.

(d) 3 Moore, 656; 7 Price, 616.

(e) 1 Taunt. 71; S. C. 2 Leach, C. C. 996.

contained in the present indictment. The statute requires that the bankrupt shall surrender and submit to be examined; and if upon such examination shall not discover, &c. The indictment alleges that he surrendered himself to the Court, and was duly sworn before the commissioner, and duly submitted himself to be examined; and that at the time of his examination, &c.—what does that mean but that he was duly examined? As to the point that it does not appear that he underwent his final examination, the examinations are in law all one examination, and only adjourned from time to time. In the form of plea, in *Chit. Jr. (a)*, of the defendant's bankruptcy after action brought, which is pleaded upon the same statute, there is no averment that the defendant ever was examined; it merely avers that the defendant submitted himself to be examined, and upon such his examination made a full disclosure, &c. He thought however the question was settled by *Rex v. Aylett (b)*. He could discover no difference between that case and the present. That was an indictment for perjury, upon the hearing of a complaint before Lord Thurlow; and it was objected that the indictment stated the perjury to have been committed *at and upon the hearing of the said complaint*, without averring in direct and positive terms that the complaint was heard. And further, that the indictment only stated "on the hearing of the said complaint *upon his oath aforesaid before the Lord Chancellor*;" by which it appeared that the Lord Chancellor had administered the oath, but not that he had heard the complaint. And Lord Mansfield, in giving judgment, said, in reference to the indictment, "If words can make a proposition clear, they are here used. This complaint, as averred, was made to the Lord Chancellor, and the defendant

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(a) By Pearson, p. 258.

(b) 1 T. R. 63; see objection 1, p. 66; Judgment of Lord Mansfield, C. J., p. 69.

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appeared before him to be examined *touching the said complaint then and there to be heard. On the hearing of the complaint before the said Lord Thurlow*, a question arose which is stated to be a material question. Then it goes on to state that, *at and upon the hearing of the said complaint*, the defendant appeared and was sworn before the said Lord Thurlow, who had a sufficient authority to administer an oath. Then it repeats that, *at and upon the hearing of the said complaint before the said Lord Thurlow*, the defendant deposed, &c. I protest I cannot comprehend words more expressive." Here the indictment avers, that the man having been duly adjudged a bankrupt was required to come and surrender at a proper time. It then goes on to say, that he did surrender himself, that he was duly sworn, and that he did submit himself to be examined. The submission to be examined was in fact an examination. [*Pollock, C. B.*—If I submit a schedule, and am asked if it be correct, and I say Yes; that is an examination; and the question is,—is it necessary to aver that in the indictment? *Platt, B.*—There must have been an examination to which he submitted. *Cresswell, J.*—Do I understand you to state that submitting to examination necessarily imports an examination?] Not so; because in practice the bankrupt frequently is not examined at all; but he is there to undergo the process, if there be any person to examine him. [*Cresswell, J.*—Do you say that the words "his said" are equivalent to "such," so that it would read, at the time of such examination, &c. *Coleridge, J.*—Supposing the bankrupt to submit and to take the oath, and no question to be put to him, can he then commit the crime of perjury?] Yes; he may be simply sworn as to his schedule. [*Coleridge, J.*—Supposing him to commit the crime by swearing to the schedule, whether it be the one or the other, should it not be alleged?] He submitted that, here, the allegation was sufficient if any force whatever was to be given to the words

“at the time of the said examination.” [*Pollock*, C. B.—You have not met the difficulty I alluded to: it was this:—It is quite consistent with this indictment that he may have appeared and been sworn, and asked touching certain matters; the whole of the day may have passed in answering questions touching his stock-in-trade, and no person may have asked him about his real estate at all.] He submitted that was a matter of evidence. When is the bankrupt to answer the question except when he is examined? If it should turn out in evidence that he was not examined on that point, it would be a matter to submit to the jury. [*Pollock*, C. B.—The objection is, that every part of the indictment may be true, and yet the prisoner may be innocent.] “At the time of the examination,” means, at the time of the whole of the examination. [*Pollock*, C. B.—That is so. Can a man who goes to be examined and is asked no question, and says nothing of his estate, be convicted of felony? Does he commit a felony because he does not disclose? I am not aware that the oath is that he shall disclose all his effects.] The statute says that the party must submit to be examined upon oath, and if upon examination he shall not discover, &c., the necessary inference therefore is, that he must disclose; and it must be presumed, that under the 32nd sect. of the statute, he was examined according to a certain form. [*Pollock*, C. B.—The oath tendered is that he will tell the truth. The words of the statute, “if he shall not discover,” mean, if he shall not discover upon questions being put to him. I am not prepared to say that this was a felony. The question really is, whether “upon” does not mean, at the time of, examination, that is, examination as to that particular matter.] “At the time of his examination” is equivalent to “during his examination,” and would not that be enough to show that he was examined? [*Pollock*, C. B.—No. The indictment must charge that which is a crime:

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it is not sufficient to charge that which may be made a crime by evidence. "At the time of his being examined" does not import that he was examined upon that point. I do not state this as my opinion, but merely point it out to you as the objection you have to contend with. *Coleridge, J.*—The word in the statute is "discover." It may be a question whether the bankrupt is not bound to discover all his estate in the course of his examination, without being asked as to such particular matter. In the note to *Russel (a)*, cited from Lord Henley, who is supposed to have been the drawer of the statute, I find it said, "There is an inaccuracy in this clause (*b*), which should be remedied on a future revision of the law: it has omitted the words "in case of any default or wilful omission.""] He would submit that, by the statute, a duty was cast upon the bankrupt to disclose the nature of all his estate, and that it was not necessary for a creditor to attend, and examine him upon the matter. The Court would adopt the sensible construction of this indictment: *Wright's case (c)*. Could the Court read this indictment without saying that it imported that the prisoner underwent some examination, and at the time of such examination did not disclose his real estate? He referred to *Rex v. Somerton (d)*. As to the second objection, that the indictment was repugnant;—the indictment averred that at the time of the examination the prisoner was possessed of a certain real estate, &c. The facts of the case were these. [*Cresswell, J.*—We cannot here go into the facts: you may suppose this to be a question before a Court of Error.] He was only supposing a state of facts which would show that the prisoner was guilty of the offence. [*Cresswell, J.*—And may you not suppose a case in which he would not have been guilty under this

(a) Vol. II. p. 228, note (a).

(b) This refers to s. 112 of stat. 6 Geo. IV. c. 16.

(c) 3 Nev. & M. 900.

(d) 7 B. & C. 465.

indictment? If he had never transferred the property would he have been guilty under this indictment?] No. [*Cresswell*, J.—'Then you do not aver that he ever did transfer. You do not show that he had the power to transfer; for you do not show that he ever had the property. *Coleridge*, J.—The presumption is, that he never did dispose of it.]

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POLLOCK, C. B.—We are all of opinion that it is impossible to get over that objection (*a*), the prisoner must therefore be discharged (*b*).

(*a*) No decision was given on the other point, "that the indictment should have contained a distinct allegation that the prisoner was examined."

(*b*) No sentence had been passed, but the prisoner still remained in custody.

CORAM

POLLOCK, C. B., PATTESON, J.,
 PARKE, B., WIGHTMAN, J.,
 TALFOURD, J.

IN THE EXCHEQUER CHAMBER.

1849.

Tuesday,
 November 20.

THE QUEEN *against* HENRY SMITHIES.

FORGERY.

On an indictment for forgery, at common law, it is not necessary to prove that the party charged was in custody before the time of the trial, in order to give jurisdiction under the statute 11 Geo. IV. & 1 Wm. IV. c. 66, s. 24. It will sufficiently appear by the caption.

A verdict, in such case, of "*Guilty of forging, but there is no evidence of its having been done within the jurisdiction of the Court,*" amounts to a conviction.

"1st. Forging a consent to act as next friend in Chancery.

"2nd. Uttering the same, with intent to defraud.

"The prisoner was not shown to have been in custody, till the time when the trial began. The jury found as to the first count that he was guilty of forging, but that there was no evidence of its having been done within the jurisdiction of the Court.

"As to the 2nd, Guilty.

"The questions are :

"1st. Was the prisoner indicted, when he was in custody, within the 11 Geo. IV. & 1 Will. IV. c. 66, s. 24 (a), he not being shown to be in custody till the time of the trial? If not,

(a) "And be it enacted, That if any person shall commit any offence against this Act, or shall commit any offence of forging or altering any matter whatsoever, or of offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered, whether the offence in any such case shall be indictable at common law, or by virtue of any statute, &c. the offence of every such offender may be dealt with, indicted, tried, and punished, and laid and charged to have been committed in any county or place in which he shall be apprehended or be in custody, as if his offence had been actually committed in that county or place." The clause then proceeds to enact that accessaries in felony and aiders and abettors in misdemeanors may be tried, &c., "in any county or place in which the principal offender may be tried."

“2nd. Is the uttering of a forged instrument, with intent to defraud, where the forging is a misdemeanor at common law, a misdemeanor? See *Reg. v. Boulton*, 2 C. & K. 604 (a).

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SMITHIES.

“W. ERLE.”

Keating, Q. C., appeared for the defendant, and stated the case. [*Parke*, B.—This point has been already decided.] Yes, it was decided in *Reg. v. Whitley* (b), that “an indictment for bigamy, found in a different county from that where the offence was committed, must allege that the prisoner was in custody at the time of the finding the inquisition in the county of the finding.” [*Parke*, B.—It was really just the reverse, the case as reported in *Moo. C. C.*, is incorrect; it is correctly reported in C. & K. (c).] Another point was, that it appeared that the jury did not, upon the count for forging, find the defendant guilty of the offence as laid in the indictment. [*Parke*, B.—That is immaterial; it was only because they could not find where he forged.] It is then a special verdict. [*Parke*, B.—No, it amounts to a conviction; the prisoner was found guilty, and the only question was whether the Court had jurisdiction, it not appearing that he was previously in custody.]

THE COURT being all of the same opinion,

Conviction affirmed.

(a) In *Reg. v. Boulton*, 2 C. & K. 604, referred to in the case, the marginal note is, “The forgery of a railway pass to allow the bearer to pass free on a railway is a forgery at common law, but the uttering of it *per se* is not a misdemeanor,” &c. To make it an offence, some fraud must be actually perpetrated by it. This point, in the present case, was not argued.

(b) 2 *Moo. C. C.* 186.

(c) Vol. I. p. 150. “If an indictment for bigamy be tried at the same assizes at which the bill is found, it will sufficiently appear by the caption of the indictment that the party is in custody in the county, so as to give the Court jurisdiction under the statute 9 Geo. IV. c. 31, s. 22; and there need not in that case be any averment in the indictment as to the custody.”

THE QUEEN *against* WILLIAM MARSH,

IN

1849.

Tuesday,
*November 20.*THE QUEEN *against* WILLIAM MARSH AND JAMES BELL LORD.

PLEADING.

An indictment charging that A. on, &c., in, &c., "did unlawfully attempt and endeavour fraudulently, falsely, and unlawfully to obtain from B. a large sum of money, to wit, the sum of 22*l.* 10*s.*, with intent thereby then and there to cheat and defraud the said B.," without stating the means adopted by the prisoner, was held insufficient after conviction.

"YORKSHIRE Summer Assizes, 1849.—The prisoners were indicted for attempting to defraud an Insurance Company called 'The Agriculturalist Cattle Insurance Company.'

"Upon the trial, at York, Lord was acquitted, and Marsh found guilty upon the fifth count of the indictment. That count was as follows :—

"And the jurors aforesaid, upon their oath aforesaid, do further present that the said William Marsh and James Bell Lord, on the said 28th day of October, in the year of our Lord 1848, with force and arms, at the said parish of Wadworth, in the said county of York, did unlawfully attempt and endeavour fraudulently, falsely, and unlawfully, to obtain from the said 'The Agriculturalist Cattle Insurance Company,' a large sum of money, to wit, the sum of 22*l.* 10*s.*, with intent thereby then and there to cheat and defraud the said 'The Agriculturalist Cattle Insurance Company,' against the form of the statute in that case made and provided, and against the peace of our said lady the Queen, her crown and dignity.

"The fraud complained of was the making a false claim in the name of Marsh upon the company in respect of an alleged loss of a horse of Marsh's by disease, which had been insured by him, with other stock, by a policy with the company.

"The policy was 'between three of the directors of The Agriculturalist Cattle Insurance Company, of the one part, and William Marsh of the other part, and was

against the loss of animals insured by death arising from disease or accident, not fraudulently or carelessly occasioned, except loss happening from glanders or castration, by stock stolen, maliciously or feloniously houghed, maimed, slaughtered, poisoned, or injured, or destroyed by fire, or any invasion, foreign enemy, or civil or military commotion whatever.'

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MARSH.

"Certain conditions were indorsed upon the policy, and amongst them the following :—' That the illness, accident, or death of an animal be not caused by any neglect or carelessness of the owner, or those in his employ ; or by ill treatment, over driving, wilful poisoning, racing, burning, glanders, or castration ; and that no claims will be paid unless the carcass be seen by the inspector.'

"The policy had no stamp, and it was contended for the prisoners that it could not be received in evidence without a stamp. The objection was overruled, and it was received on the ground that it was one of the instruments by which it was intended to effect the alleged fraud.

"The false claim was in writing signed by Marsh and attested by Lord. Proof was given of their handwriting ; but it was contended for the prisoner Marsh, that the other prisoner Lord, being the attesting witness, should be called as a witness for the prosecution.

"This objection, however, was also overruled ; the written claim was received upon proof of the handwriting of the prisoners without calling Lord as a witness.

"The registration of the company under the 7 & 8 Vict. c. 110, by the title of 'The Agriculturalist Cattle Insurance Company,' dated 1st September, 1845, was put in and read. It appeared that the company had a deed of settlement, which was not produced.

"It was contended for the prisoners that the company could not be described as such, nor by their name of registration in an indictment.

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MARSH.

“That their name could only be shown by the deed of settlement. That they only became a company under the 7 & 8 Vict. c. 110, from the date of the certificate, and the certificate was not proved.

“These objections were also overruled. The prisoner Marsh being convicted upon the fifth count. A motion was made in arrest of judgment, on the ground that that count did not show any offence in law.

“The questions for the opinion of the Court are :—

“1st. Whether the judgment on the fifth count ought to be arrested?

“2nd. And if the Court thinks that it ought not, then, Whether the objections taken at the trial, or any of them, ought to have prevailed (a).

“WM. WIGHTMAN.”

Bliss, for the prisoner. The objection to the fifth count was, that it did not show any indictable offence. It stated an attempt to commit a fraud which might, under certain circumstances, have been a misdemeanor, but it did not show that those circumstances existed. It alleged a cheat, but not such an one as is indictable. Besides, it did not show in whom the property attempted to be obtained was. The offence as laid is,—that he unlawfully attempted to obtain from the company a large sum of money, with intent to cheat and defraud the said company. To obtain from an individual money with an intent to defraud him is not an indictable offence. [*Parke*, B.—It must be by false pretences.] And even then the indictment should set forth the false pretences; for this he relied upon *East*, P. C. 818; *Rex v. Wheatly* (b); *Rex v. Lara* (c); and *Rex v. Mason* (d); 1 Stark. C. P.

(a) Judgment having been arrested, it became unnecessary to argue those objections.

(b) 2 Burr. 1125.

(c) 6 T. R. 565.

(d) 2 T. R. 581.

95 (a). Indeed it was very clear, because, unless the attempt was to commit a misdemeanor there was no crime whatever. The misdemeanor must be defined so as to constitute a crime.

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MARSH.

With respect to the second point, he quoted *Reg. v. Martin* (b); and *Reg. v. Norton* (c), when (upon inquiry, no counsel appearing on the part of the Crown) he was stopped by the Court.

POLLOCK, C. B.—We think the objection is well founded, and that the judgment must be arrested.

(a) Where it is said, "It seems to be an universal rule, that, in the description of all crimes founded in fraud, the *instrument* or *means of fraud* must be specified.

"And this is necessary, because every fraud is not an indictable offence; thus at common law, a man who obtains money by a mere naked lie is not criminally, though he may be civilly, responsible: whether particular circumstances constitute an indictable fraud is a question of law; and therefore, according to a fundamental rule of description in indictments, such circumstances must be set out, in order to show that the facts amount to an indictable offence. Hence, an indictment for cheating, at common law, cannot be maintained, unless some specific false token be alleged.

"And under the stat. 33 Hen. VIII. against obtaining money by false tokens, it is necessary to specify the particular tokens (*Rex v. Mason*, Leach, 487, 4th ed.; 2 Stra. 1127); for the statute is confined to letters and tokens in the name of a third person (*Reg. v. Munoes*; 7 Mod. 316).

"Under the statute, against obtaining money by false pretences, it is necessary to describe the false pretences, because some false pretences are not within the statute" (2 Burr. 1127; *Mason's case*, Leach, 548; Leach, 720, 3rd ed.). But now by stat. 7 & 8 Geo. IV. c. 29, s. 53, it is enacted, "That if any person shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor," &c. (and see Russ. & Ry. 81, 127, 190, 461, 504).

(b) 8 Ad. & E. 481.

(c) 8 C. & P. 196.

CORAM

POLLOCK, C. B.,
PATTESON, J.,

WIGHTMAN, J.,
PLATT, J.,

TALFOURD, J.

1849.

Tuesday,
November 20.

THE QUEEN *against* ROWLAND GALLEARS.

PLEADING.

In an indictment for larceny, "*one ham, of the value,*" &c. &c., is a sufficient description.

"SHROPSHIRE, to wit.—At the General Quarter Sessions of the Peace, of our Sovereign Lady the Queen, held at the Shire Hall, in Shrewsbury, in and for the county of Salop, on Monday, in the first week after the 24th day of June, to wit, the 2nd day of July, in the year of our Lord 1849.

"The prisoner, Rowland Gallears, was indicted for stealing, on, &c., at the parish of Condover, in the county of Salop, one ham of the value of ten shillings, of the goods and chattels of one Thomas Heighway; to which indictment the prisoner pleaded 'Not Guilty.' Whereupon the evidence in support of the prosecution having been adduced, it was objected, by Mr. Kenealey, as counsel for the prisoner, that the prisoner could not be convicted of felony, inasmuch as it did not sufficiently appear by the indictment, that the article stolen was the subject of larceny; it being urged, by the said counsel, that for anything that appeared on the face of the indictment, it might have been the ham of an animal *feræ naturæ*, a wild boar for instance, which had been stolen.

"The Court overruled the objection, reserving, on the application of the prisoner's counsel, the question of law which had so arisen for the consideration of her Majesty's Judges.

The counsel for the prisoner having addressed the jury, the jury found the prisoner guilty of the said offence, whereupon the Court sentenced the prisoner to one month's imprisonment in the House of Correction with hard labour, but respited the execution of such judgment until the said question had been considered and decided; and the Court, in its discretion, did take a recognizance of bail of the prisoner with sureties pursuant to the statute.

“The question as to the sufficiency of the indictment is therefore respectfully submitted for the consideration of her Majesty's Judges.

“THOMAS KENYON,
“Chairman for the Court of Quarter
Sessions of the County of Salop.”

Henniker, for the prisoner, submitted in the first instance that the word “ham” did not necessarily mean the salted flesh of swine. [*Parke*, B.—But supposing it to have been a bear's ham.] There was the case of *Reg. v. Cox (a)*, where the prisoner was indicted for stealing three eggs, and the indictment was held insufficient in merely stating them to be “eggs,” inasmuch as they might have been the eggs of an adder (or of a crocodile), in which there could have been no property. There were animals *feræ naturæ* of two kinds, some which are fit for human food and others which are not on account of the baseness of their nature. Here the ham may have been of an animal which would not serve for food. In Richardson's Dictionary, “ham” is said to be the leg of any animal. In Russel on Crimes (*b*) it is said, “There is yet another kind of animals to be noticed, namely, those which, though they may be reclaimed, are not such of which larceny can be committed by reason of the *baseness of their nature*. Some animals, which in this country are

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GALLEARS.

(a) 1 C. & K. 494.

(b) Vol. II. p. 85.

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GALLEARS.

now usually tame, come within the class in question, as *dogs* and *cats*; and others which, though wild by nature, are often reclaimed by art and industry, clearly fall within the same rule, as *bears, foxes, apes, monkeys, polecats, ferrets*, and the like." [*Pollock, C.B.*—Suppose the skeleton of a wild animal about which much pains had been taken—a stuffed panther for instance—might a person steal it? *Platt, B.*—Suppose the epicures of the day to be very fond of the leg of a rat, and that it was generally sold for food, might not a larceny be committed in respect of it?] The same observations equally apply to the case of *Reg. v. Cox*. A "ham" means simply the leg of an animal. Dogs were not the subject of larceny at common law. An indictment simply stating the stealing a dog would not, before the statute (a), have been sufficient. Of animals *feræ naturæ*, and which serve for food, you must show, upon the face of the indictment, the fact that it is fit for food. Supposing this to have been the leg of a wild animal, it does not follow that the animal was killed by the prosecutor; it may have been accidentally, or otherwise, torn from the animal. The name of the part is the same, whether the animal be alive or dead. Suppose the indictment to have charged the stealing of one leg, it would have been bad for uncertainty; so with the word "ham," which is but part of a leg. He could not distinguish this case, in principle, from *Reg. v. Cox*. [*Pollock, C. B.*—I very much doubt whether that case is law.]

POLLOCK, C. B.—We are all of opinion the decision in this case was perfectly right.

Larceny, at common law, cannot be committed of things that are *feræ naturæ*, unreclaimed, and *nullius in bonis* (1 Hale, P. C. 510; Fost. 366); but of such of these as are reclaimed and made tame or domestic, and serve for food, larceny may be committed (1 Hale, P. C. 511; 1 Haw. P. C. c. 33, s. 26); yet, it cannot be, though they be reclaimed and made tame or do-

(a) Stat. 7 & 8 Geo. IV. c. 29, s. 31; 8 & 9 Vict. c. 47.

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GALLEARS.

mestic, if they serve not for food * (1 Hale, P. C. 512; Wood's Inst. 367; *Rex v. Searing*, R. & R. 350; 3 Inst. 102; 1 Haw. P. C. c. 33, s. 23). And of those unreclaimed, and which serve for food when killed, larceny may be committed of their flesh or skins (Hale, P. C. 511); but larceny cannot be committed of such things as are not the subject of property; as of a dead corpse (Arch. Cr. Law, 176, 9th ed.); nor of the thigh or ham of a corpse; nor, in such a case (it is presumed), would it help, that it was laid as the goods and chattels of, &c.; for it could not in law be proved, nor after verdict be assumed to have been proved, that any person had a property in that which the law determines is the property of no man; although the taking might be treated as a misdemeanor, as being highly indecent, and *contra bonos mores* (see *Rex v. Lynn*, 2 T. R. 733).

But it is to be observed that the word "ham" has acquired a more special and much more familiarly known signification, as being the thigh of a hog salted and cured (see Johnson's Dict.); and, in fact, it is the only signification attached to it when coupled with the *indefinite* article "a," or that which is perhaps equivalent, the adjective "one." In Arch. Cr. Law, 48, 9th ed.: "Where personal chattels are the subject of the offence, as in larceny, they must be described by the names usually appropriated to them." [The reference there made to 2 Hale, P. C. 182, 183, is not perhaps altogether satisfactory for that position.] In 2 Haw. P. C. Blk. 2, c. 25, s. 60, p. 314 (last edit. by Curwood), immediately following the rule, "That in an indictment nothing material shall be taken by intendment or implication," is observed; "yet the law will not admit of too great a nicety of this kind," as, &c.; "but (s. 61) I cannot find any certain rule whereby it may be known in what cases an exception of this kind shall be taken to be so over-nice that the Court will not regard it. All, therefore, that I shall add on this head, is this; that as, on the one hand, the law will not suffer a man to be condemned of any crime whereof the jury have not expressly found him guilty, by any argument or implication from what they have found; so, on the other hand, it will not suffer a criminal to escape on so trifling an exception, which it would be absurd and ridiculous to take notice of; for *nimia subtilitas in jure reprobatum*. But the judgment hereof cannot but be in a great measure left to the discretion of the Judges, who from the circumstances of each particular

* In 2 Russ. on Cr. p. 85:—"The reason upon which this doctrine appears originally to have proceeded is, that creatures of this kind, for the most part wild in their nature, and not serving when reclaimed for food, but only for pleasure, ought not, however the owner may value them, to be so highly regarded by the law, that for their sakes a man should die; 1 Haw. P. C. c. 33, s. 36; 4 Bl. Com. 236; 2 East, P. C. c. 16, s. 45, p. 614" (but see Haw. P. C. c. 33, s. 23, where "larceny may be of hawks at common law, because of the high value set upon those birds"). Death being no longer a punishment for larceny, this reason why such property should not be protected by the law is gone, but the law remains.

It is to be observed, that although larceny cannot be committed of such things, the owner may have a lawful property therein, and maintain trespass (1 Hale, P. C. 512).

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case, the comparison of precedents, and the plain reasoning of the thing, seem always to have endeavoured to go within these rules as nearly as possible."

In *Rex v. Stevens*, 5 East, 257, (a criminal information,) Lord Ellenborough confirms and adopts the view taken by Lord Holt, in *Wyatt v. Aland*, Salk. 325; where his Lordship observes, "that where a matter is capable of different meanings, that shall be taken which will support the declaration (or agreement), and not the other, which would defeat it." And Lord Ellenborough goes on to observe, "If it be clearly capable of different meanings, it does not appear to clash with any rule of construction, applied even to criminal proceedings, to construe it in that sense in which the party framing the criminal charge must be understood to have used it, if he intended that his charge should be consistent with itself." And again, "Every indictment or information ought to contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy; and except in particular cases, where precise technical expressions are required to be used, there is no rule that other words shall be employed than such as are in ordinary use; or that, in indictments or other pleadings, a different sense is to be put upon them than what they bear in ordinary acceptation." And in his conclusion he says, "If the sense be clear, nice exceptions ought not to be regarded; in respect of which Lord Hale (2 P. C. 193) says that 'more offenders escape by the over-easy ear given to exceptions in indictments than by their own innocence, and many heinous and crying offences escape by these unseemly niceties, to the reproach of the law, to the shame of the government, and to the encouragement of villany and the dishonour of God.'"

It may be added, that it is a well-known rule that goods may be described by the name by which they are known in trade, and where an article has obtained in common parlance a particular name of its own, it would be wrong to describe it by the name of the material of which it is composed (see Arch. Cr. Law, p. 48, 9th ed.).

THE QUEEN *against* JOHN BOULTON.

CHATTEL, &c.

1849.

Tuesday,
November 20.

“ YORKSHIRE Summer Assizes, 1849.—The prisoner was convicted upon the sixth count of an indictment, charging him with obtaining by false pretences, from a servant of the Lancashire and Yorkshire Railway Company, a railway ticket of the company, for a journey from Bradford to Huddersfield by one of their trains.

A railway pass-
ticket is a chat-
tel (and of
value) within
the statute 7 &
8 Geo. IV. c.
29, s. 53.

“ The count was as follows:—

“ And the jurors aforesaid, upon their oath aforesaid, further present, that the said John Boulton afterwards, to wit, on the 11th day of April, in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, knowingly, and designedly, did falsely pretend to one Charles Turner, he the said Charles Turner being then and there a servant of the said Lancashire and Yorkshire Railway Company, that a certain ticket which he the said John Boulton then and there delivered to the said Charles Turner, was then and there a genuine ticket of the said company, before then obtained by him the said John Boulton from the said company, for the conveyance of him the said John Boulton as a passenger in and by certain carriages of the said company from the said town of Bradford to Huddersfield aforesaid, on the said 11th day of April. By means of which last-mentioned false pretence, the said John Boulton did then and there unlawfully obtain from the said Lancashire and Yorkshire Railway Company a certain chattel, to wit, a printed ticket of the said company, authorizing the bearer thereof, to be thereafter conveyed without further charge or payment in that behalf, by certain carriages of the said

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company, on the said 11th day of April from the said town of Bradford to Huddersfield aforesaid, the said last-mentioned ticket being then and there the goods and chattels of the said Lancashire and Yorkshire Railway Company, and of the value of, &c., with intent thereby then and there to cheat and defraud the said Lancashire and Yorkshire Railway Company of the same. Whereas in truth and in fact the said ticket so delivered as last aforesaid by the said John Boulton, was then and there not a genuine ticket of or obtained from, the said company, for the conveyance of any person as a passenger by any carriage of the said company, or any journey whatsoever, to the great damage and deception of the said company, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.”

The following specimen shows the form of the ticket of the company :—

Express Train.		
Bradford		
to		
Huddersfield.		
23.	1st Class.	23.

And was a voucher for the journey without further payment, but to be given up to the company when the journey was concluded.

The prisoner was stopped upon the line before he finished his journey, and was taken into custody with the ticket in his possession.

“The question is, Whether the obtaining such a ticket was ‘obtaining a chattel of the company with intent to cheat and defraud the company of the same’ within the meaning of the Act of Parliament.

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“WM. WIGHTMAN.”

No counsel appeared on either side.

POLLOCK, C. B.—This was an indictment for obtaining a railway ticket by false pretences, and the question reserved for us is, Whether obtaining such a ticket was obtaining a chattel of the company with intent to cheat and defraud the company of the same, within the meaning of the Act of Parliament (*a*). We are of opinion that it was: that, it being a ticket which entitles the bearer to travel on the railway without further charge, it is of value; nor does the fact that it was to be returned to the company at the end of the journey prevent it from being an article of value while it is out of their possession.

Conviction affirmed.

(*a*) 7 & 8 Geo. IV. c. 29, s. 53.

THE QUEEN *against* WILLIAM THRISTLE.

1849.

Tuesday,
November 20.

A watchmaker received a watch to repair. There was no evidence of a felonious intent at the time he received it. Held, that a subsequent appropriation did not amount to larceny.

FELONIOUS INTENT.

“ WORCESTERSHIRE Quarter Sessions, October, 1849.—
The prisoner, William Thistle, was indicted for stealing one watch, the property of the prosecutor, Thomas Reynolds. It appeared in evidence that the prisoner, who was a watchmaker at Malvern, received from the prosecutor, some time in January, 1848, his silver watch to repair. The prisoner returned it to the prosecutor. A few days after the prisoner had so returned it, the prosecutor told the prisoner that the watch gained. The prisoner said, that if the prosecutor would let him have it again, he would regulate it, and return it in a day or two. The prosecutor thereupon gave the watch to the prisoner, who in eight or nine days left Malvern with the prosecutor's watch in his possession, and was not again heard of until he was arrested on the present charge some time afterwards. The prosecutor was unable to say whether he had paid for the repairs of his watch or not; but stated that the prisoner, when he left Malvern, had other repairs of the prosecutor on hand and unfinished.

“ The prisoner, when taken into custody, said, ‘ I have disposed of the property, and it is impossible to get it back.’

“ The jury found a verdict of guilty; but the Chairman, being of opinion that there was no evidence of a felonious taking on the part of the prisoner when he received the watch to regulate from the prosecutor, and entertaining a doubt whether the subsequent departure of the prisoner from Malvern, with the prosecutor's watch in his possession, could under the circumstances above detailed constitute larceny, requests the opinion of the learned Judges whether this conviction of William Thistle be right or wrong.

(Signed)

“ JOHN S. PACKINGTON,
“ Chairman of Quarter Sessions
for County of Worcester.”

The following case was also reserved, at the end of which the judgment of the Court, in both cases, will be found.

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THRISTLE.

“The prisoner, William Thristle, was again indicted for stealing one watch, the property of Robert Warren.

“It appeared in evidence that the prosecutor, in February, 1848, met the prisoner, who was a watchmaker at Malvern. The prosecutor asked the prisoner if he was going as far as the prosecutor’s house. The prisoner said, Yes, if the prosecutor had anything for him.

“The prosecutor said his watch wanted regulating, if prisoner would call.

“The prisoner went to the prosecutor’s house, and after examining the watch, told the prosecutor’s wife that he could do nothing with it there, but must take it to his own house. Prisoner then took it, and on his way home met the prosecutor, to whom he mentioned that he was taking the watch to his own house, and would return it in two or three days. Prosecutor made no objection. In a few weeks after, prisoner left the neighbourhood without returning prosecutor’s watch, which has not since been heard of. The prisoner, on being taken into custody, said, ‘I have disposed of the property, and it is impossible to get it back.’

“The jury returned a verdict of guilty, but the Chairman being of opinion that there was no evidence of a felonious taking when the prisoner first took the watch from the prosecutor’s house with the knowledge and in the presence of the prosecutor’s wife, and entertaining doubt whether the prisoner’s subsequent appropriation of the watch could, under the circumstances above detailed, constitute larceny, requests the opinion of the learned Judges whether this conviction of William Thristle be right or wrong.

(Signed) “JOHN S. PACKINGTON.

“Chairman of Quarter Sessions for
County of Worcester.”

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POLLOCK, C. B. (after stating the facts, said,)—With respect to both these cases, we are of opinion that it is quite clear that unless the possession was obtained with a felonious intent, no subsequent appropriation will make it a larceny.

Conviction quashed.

See *Reg. v. Thurborn*, p. 67 ; *Reg. v. Hey*, p. 209.

THE QUEEN *against* FRANCIS ELMSLEY TOSHACK.

Case reserved by the Honourable Justice Patteson.

FORGERY AT COMMON LAW.

1849.

*Wednesday,
November 28.*

“THE defendant pleaded guilty to an indictment for forgery at common law.

“The indictment states that at the time of the offences in the first six counts mentioned William Pixley, and others on behalf of the corporation of the Trinity House, were in the habit of examining persons voluntarily submitting to such examination touching their nautical skill, and to grant them certificates of fitness to act as masters. That in order to enable persons to be examined and procure such certificates, it was necessary to produce, to the examiners, certificates of service, and sobriety, and good conduct, at sea for not less than six years. That the examiners had in their possession pieces of paper of the value of one penny each, on which they were in the habit of granting certificates.

To forge a certificate of service, sobriety, and good conduct at sea, with intent to deceive and defraud, &c., is an offence indictable at common law.

“1st count. That defendant, having certificates of service for less than six years, in order falsely to obtain a certificate from the examiners, forged a certificate of service under the hand of Wm. Neilson, as to his, defendant's, service on board the barque ‘Ruckers,’ to the great damage, deception, and prejudice of the examiners.

“2nd count. For uttering such forged certificate.

“3rd count. As the first, for forging, only adding at the close ‘and did thereby, and by means thereof, attempt and endeavour to defraud the said corporation of one of the said pieces of paper, to the great damage,’ &c.

“4th count. For uttering, with the same additions as 3rd.

“5th count. That defendant, having in his possession the

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forged certificate (setting it out), did produce it to one Grey, clerk to the examiners, and did knowingly and falsely pretend that it was genuine, with intent by means of the false pretence to obtain from the examiners one of the pieces of paper, and did thereby knowingly, by the said false pretence, attempt to cheat and defraud the examiners of one of the pieces of paper.

“ 6th count. Same as 5th, only laying it to defraud the corporation of one of the pieces of paper.

“ 7th count. Without inducement, that defendant did forge a writing as the certificate of William Neilson, with intent to deceive and defraud William Pixley and others.

“ 8th count. For uttering same.

“ 9th count. As 7th, with intent to deceive and defraud the corporation of the Trinity House.

“ 10th count. For uttering same.

“ Having some doubt whether any of these counts state an indictable offence, and at the suggestion of the Counsel for the prosecution, I have reserved this case for the opinion of her Majesty's Judges.

“ J. PATTESON.”

No counsel was heard on either side.

ALDERSON, B. delivered the judgment of the Court, and after stating the facts and the importance of the duty which the Trinity House had to discharge, continued—The Court (*a*), by whom this case has been considered, have instructed me to say that they are of opinion that the 7th and 9th counts of this indictment are quite sufficient to found a judgment upon, and that the offence there charged does amount to a forgery at common law. Upon those counts therefore, when the defendant who is at present at large is taken, judgment will be pronounced.

(*a*) Pollock, C. B., Patteson, J., Wightman, J., Platt, J., Talfourd, J., see p. 196.

SITTINGS AFTER MICHAELMAS TERM.

IN

THE THIRTEENTH YEAR OF THE REIGN OF VICTORIA.

CORAM

LORD DENMAN, C. J.,

ALDERSON, B.,

PARKE, B.,

COLERIDGE, J.,

COLTMAN, J.

THE QUEEN *against* GEORGE HEY.

SERVANT.

1849.

Saturday,
Dec. 8 (a).

“BOROUGH of Leeds, in the County of York.—At the Leeds Christmas Sessions, A.D. 1848, George Hey was tried before me (*b*), as Assistant Barrister for the Borough of Leeds, (under stat. 7 Will. 4, & 1 Vict. c. 19,) on an indictment, which charged that he, whilst the servant of William Richardson and another, stole ten pigs the property of his said masters. It appeared in evidence that, on the 26th of September, 1848, Richardson and Lambert, the prosecutors, pig-jobbers at Newcastle, having purchased pigs which they knew would suit Goose, a pig-dealer at

The prosecutors employed the prisoner (a butcher and drover) to take pigs and deliver them to A., and to bring back such sum, in post-office orders or a cheque, as A. should give him, on being shown by him a paper from the prosecutors. He had 2*l.* given him for his expenses, for which he was to account, but nothing was said of the manner in which he was to be paid for his trouble: there was an established custom to pay drovers so much by the day for the time they were employed. The prisoner was at liberty to drive cattle at the same time for others. He sold the pigs, and appropriated the proceeds to his own use. Held, that the prisoner was not a servant to the prosecutor. That, as a bailee, without proof that he intended to appropriate them to his own use at the time he received them, he could not be convicted of larceny.

(a) This case came under the consideration of the above-named Judges on Saturday, January 20th, 1849, but in consequence of their not being able to agree in their judgment, it stood over until this day.

(b) Robert Hall, Esq.

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Leeds, engaged the prisoner, a butcher and drover at Newcastle, to go with the pigs by railway from Newcastle to Leeds, and there deliver them to Goose, and bring back to the prosecutors such sum in post-office orders, or a banker's cheque as Goose should give him, on being shown a paper which the prosecutors gave to the prisoner for that purpose, the contents of which paper were not given in evidence, the prisoner having had no notice to produce and not producing it. The prisoner had no authority to sell the pigs, or to do anything with them, but deliver them to Goose; and no instructions were given him as to what he was to do with them should Goose refuse to accept them. The prisoner took the pigs to Leeds, and went with them to Goose's house there, before six o'clock A.M. of the 27th September, whilst all the inmates were in bed; Goose himself was from home at the time, but his wife, being awakened by the prisoner, called up a man, to whom she referred the prisoner, and returned to bed. That man merely looked out of the window and said, 'Is that you?' then shut the window and disappeared, as if returning to bed, without listening to the prisoner or giving him any directions; the prisoner then took the pigs to the Leeds pig-market, and called up a pork-butcher, to whom he sold them between the hours of six and seven o'clock of the same morning, received the price, 35*l.*, and absconded with it, making no communication of any kind or at any time to the prosecutors. It appeared that the prisoner had frequently been employed by the prosecutors in the capacity of a butcher, to slaughter and cut up pigs, &c., for which he was paid by the job, but he had never before been employed by them as a drover. He had 2*l.* given him for expenses, for which he was to account; nothing was said as to the manner in which he was to be paid for his trouble, but there was an established custom in the trade to remunerate drovers for such services by a payment of a sum *per diem* for the number of days

occupied. Nothing was said on the subject of the prisoner's being at liberty to drive cattle for any other person at the same time, but by the usage of the trade he was at liberty to do so. The prisoner's defence was, that he was in partnership with the prosecutors, and took the pigs to Goose's house, not in pursuance of any directions, but as to a likely customer of his own selection, and not being attended to there he sought out another customer. If the witnesses spoke the truth this defence was entirely false. There was no evidence of any intention on the part of the prisoner to steal the pigs, at the time of their being delivered to him. Nevertheless, I doubted whether the prisoner was, under the circumstances, a servant, and also whether there was a taking by him which amounted to larceny. (*Reg. v. Goodbody*, 8 C. & P. 665). But *Reg. v. Hughes*, Moo. C. C. being cited, I felt bound by the case last mentioned, and directed the jury that, if they believed the witnesses, the prisoner was the servant of the prosecutors, and the taking amounted to larceny, if the prisoner had sold the pigs for the purpose of appropriating the proceeds to his own use, and not for the benefit of his employers, on what he considered to be an emergency not provided for by his instructions. The jury having found the prisoner guilty I postponed judgment, under 11 & 12 Vict. c. 78, in order to take the opinion of the Court, under that statute, whether, under the circumstances, the prisoner was the servant of the prosecutors, and whether the taking amounted to larceny."

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HEY.

No counsel appeared on either side.

PARKE, B., delivered the judgment of the Court.—This case has been stated by the Assistant Barrister of the Borough of Leeds, for the opinion of this Court, which has taken time to consider the question, and I will now deliver the judgment of the majority of the Judges. Lord Den-

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man does not concur with the rest of the Court, and, if this had not been a case where the party was in prison, the Court would have waited until Lord Denman's return ; but, as the majority of the Court considered the prisoner had been improperly convicted, it has been thought right to deliver the judgment now. [His Lordship here stated the facts of this case as above.] The only question is, whether, on these facts, the prisoner received the pigs into his custody as servant to the prosecutors, or in the nature of a bailee. If as bailee, he would not be guilty of larceny, unless he had intended to appropriate them to his own use at the time he received them, which was not the case. If he received them as servant to the prosecutors, he would be guilty of larceny, according to the finding of the jury. There are several cases upon the question whether a person is a mere servant or a bailee, but not one of them is precisely like the present, although the case of *Rex v. Bernard M'Namee* (a) nearly approaches to it. In this case, the circumstances that the prisoner had received a certain sum for his expenses, and that the customary mode of his remuneration was by the day, tend to show that he was a mere servant ; while, on the other hand, the fact of his being a drover by trade, and of his having the liberty to drive the cattle of any other person, by the general usage with respect to drovers, raises an inference that he was not a servant. The learned assistant-barrister felt himself bound by the decision of the Judges in the case of *Rex v. Hughes* (b) ; but that case was under the stat. 7 & 8 Geo. IV. c. 29, s. 47, which makes embezzlement by a servant, or any person employed to receive money in the capacity of a servant, felony : there the learned recorder of London doubted whether the prisoner fell under either description ; though, if the indictment had been referred to, it would have been found

(a) 1 Moo. C. C. 368.

(b) 1 Moo. C. C. 370.

necessary to prove that he was *a servant*. The Judges, however, decided that the prisoner was properly convicted; consequently, that he was a servant *or* person employed in that capacity, and authorized as such to receive money, so that his receipt would be a discharge to the debtor. The question here is not exactly the same; it is, whether the prisoner had the custody of the cattle as a servant to the prosecutors at the time of the receipt of them: we think that he could not be so considered, unless, in driving the cattle to market, he was so far their servant, that the prosecutors would have been responsible for any negligent act of his in driving them. This subject has undergone much discussion of late, and it has been placed on its proper footing by the case of *Quarman v. Burnett* (a) and other cases, one of which (*Milligan v. Wedge* (b)) is that of a general drover, who was held not to be a servant so as to make the owner of the cattle responsible for his negligence. After the full consideration which this subject has undergone, we doubt whether the case of *Rex v. Bernard M'Namee*, above referred to, would now be decided in the same way. Upon the whole, we think, it was not proved in this case that the prisoner was a mere servant, and the conviction was therefore improper.

The LORD CHIEF BARON said that he had come in to form a Court, and he fully concurred in the judgment.

Conviction quashed.

(a) 6 M. & W. 499.

(b) 12 Ad. & E. 737; S. C. 10 Law J. Q. B. 19,

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HEY.

HILARY TERM,
IN
THE THIRTEENTH YEAR OF THE REIGN OF VICTORIA.

CORAM
WILDE, C. J., WIGHTMAN, J.,
ALDERSON, B., PLATT, B.,
WILLIAMS, J.

THE QUEEN *against* THOMAS SMITH.

Case reserved by the Honourable Baron Platt.

1850.
Saturday,
January 19.

THREATENING LETTER.

A letter containing an assertion that mischief will happen, which the writer will not prevent, unless he receives a sum of money, is a threatening letter within the statute 7 & 8 G. IV. c. 29, s. 8.

Where an objection, that the learned Judge at the trial did not leave a certain question to the jury has not been reserved, this Court will

not send the case back to be amended in order to raise the point.

This Court will not consider an objection which has not been reserved, even though it should be fairly deducible from the case itself.

This Court will not go into any matter of evidence which occurred at the trial if it is not stated in the case.

Before the case is submitted to this Court counsel may apply to the Judge, by whom, it is stated, to amend.

“THOMAS Smith was convicted before my brother Williams and myself, at the last September Session of the Central Criminal Court, of having knowingly and feloniously sent to Sir Walter Rockliff Farquhar, Bart., and others, a letter directed to them by the names and description of Messrs. Herries, Farquhar, and Co., St. James’s Street, demanding money of and from them with menaces, and without any reasonable or probable cause against the form of the statute.

“At the close of the case for the prosecution, the prisoner’s counsel submitted that the letter set forth on the indictment did not amount to a threatening letter within the meaning of the 7 & 8 Geo. IV. c. 29, s. 8. My brother Williams and I thought that it did, but reserved the point for the consideration of Her Majesty’s Judges

sitting in a court of appeal. The following is a copy of the letter:—

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“ ‘GENTLEMEN,—You say that B. O. N. will accede to the terms proposed, and send part of the means to any place which may be named. You would have had an answer yesterday but was prevented. If you act honestly by me and not by any means deceive me or allow any spy to watch me, I will save you or perish in the attempt, though I hazard my life in so doing, and must have means sufficient at my disposal, without delay, or all will be lost. I am fully assured that 20,000*l.* would not cover the horrid catastrophe which would not only stop your bank for a time but perhaps for ever, as the books would all be destroyed. The match—the most dreadful and last resource—has been contemplated by the cracksman or captain of this most horrid gang, which I fervently pray to be relieved from. I have never yet, so help me God, done a deed I am afraid or ashamed of, and the only way I can privately obtain means will be the following:—At the London end of Kensington Gardens, on the Knightsbridge side, there is a dike sloped which divides the gardens from the park, and a carriage road where the roads meet as you turn to ride or drive across the bridge; it is a short distance from the first bridge where the keeper remains in the garden. By looking up that dike you will see large iron pipes which convey water to the pond. A large elm-tree stands between the park and the garden, and there is sufficient room under the first pipe to place a small bag. If, therefore, you will send a man you can confide in, and lodge beneath that pipe 250 sovereigns unseen by mortal eye, I swear by Almighty God most solemnly, that the evil to which I have alluded shall be averted, if when I have completed my task and informed you when all is safe and denounced the villains you will let me have 250*l.* more, which if God prosper me I will repay with gratitude, as I

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could not get into business for less than 500*l.* to obtain a respectable living. Let the money be lodged to-morrow, (Saturday morning) by half-past eleven o'clock, but not one moment sooner and all shall be well with you, but if I am at all deceived in any possible way all must fall on yourselves.'

"The jury found the prisoner guilty."

Bodkin for the prisoner. This was an indictment framed under the stat. 7 & 8 Geo. IV. c. 29, s. 8. Whether a letter which is the subject of an indictment under this section is a letter attended with menaces, is a question which should be decided by the jury, and he submitted that the judge did wrong by merely leaving it to the jury to say whether the prisoner was guilty of sending this letter. [*Wilde*, C. J.—That is not reserved.] He proposed that the case should be amended by inserting that objection. [*Wilde*, C. J.—No. *Wightman*, J.—The only question reserved for us is, whether this is a threatening letter within the meaning of the statute. *Platt*, B.—The learned counsel was told that this point would be reserved and he was content.] It is to be drawn fairly from the case itself that the learned Judge considered this was a pure question of law for him to consider. [*Wightman*, J.—It is not the point taken, nor is it the point submitted. *Wilde*, C. J.—When you saw the case stated, you should have applied to the learned Judge to amend it.] He was not aware that such an application could be made. [*Wilde*, C. J.—Such an application was once made to me, and I was glad of the suggestion.] Upon the construction of the letter, he referred to *Reg. v. Pickford (a)*, which is the only case under the late statute. Two letters were given in evidence. [*Wilde*, C. J.—We know nothing of any other letter than

(a) 4 C. & P. 227; see 2 Russ. on Cr. 717.

that set out in the case. *Alderson*, B.—And all you have to do is to contend that that is not a threatening letter.] It is extremely difficult to distinguish this case from *Reg. v. Pickford*; the letter does not contain any menace on the part of the person writing. [*Wilde*, C. J.—He certainly does not threaten mischief, but he says that he will not prevent it.] It is not every menace which is within the meaning of this highly penal statute. Menaces frequently take place in the common concerns of life, as threatening to bring an action, &c. The true rule by which the Court would be guided, is that laid down by Lord Ellenborough, C. J., in *Rex v. Southerton* (a); there, speaking of indictments at common law, the learned Judge said that the threat must be “either attended with duress, or such as may overcome the ordinary free will of a firm man and induce him from fear to part with his money.” That is the correct rule. Applying that test to the letter in question, it is a silly, clumsy, foolish, and transparent attempt to get money from the parties; but it does not amount to the offence contemplated by the statute. In *Reg. v. Pickford*, the circumstances were precisely the same; the same intimation of danger; and in that case, although the question of the construction of the letter was left to the jury, who found that it did contain menaces, yet the Judges held the conviction wrong, and ordered the prisoner to be discharged. [*Wilde*, C. J.—It appears that the Judges in that case thought it was only a demand, and that it did not amount to menaces. *Alderson*, B.—“Let the money be lodged to-morrow morning by half-past eleven, but not a moment sooner, and all shall be well with you; but, if I am at all deceived in any possible way, all must fall on yourselves.” Was not that a threat that something should happen? *Rex v. Pickford* was a very different case.] It was not a letter

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(a) 6 East, 126.

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likely to overcome the reason of any banking-house
London.

Ballantine, in support of the prosecution, was not heard.
WILDE, C. J.—I cannot persuade myself into a doubt
in this case. The question to be looked at is whether there
is a demand of money and whether a threat is held out that
something will happen unless the money is forwarded.
My learned brothers concur with me in the view that the
letter contains that species of demand which the statute
contemplated; and we think that the statute is satisfied
where a man requires a sum of money from another under
circumstances calculated to induce him to part with it
against his will, in order to avoid a threatened evil. With
respect to the observation that “the demand must be
such as a firm man would be likely to yield to” our judgment
must be regulated by the nature of the demand
rather than by any speculation upon the nerves of the individual.
If this letter contains a demand, of which no one can
doubt, how is it accompanied? Why by an intimation that
something will happen if the money be not paid: “that
certain cracksman of this most horrid gang had contemplated
the match, the most dreadful and last resource
that twenty thousand pounds would not cover the horrid
catastrophe, which would lead to a stoppage of the bank.
And then “If you will lodge two hundred and fifty sovereigns
I swear that the evil to which I have alluded shall be
averted.” This it seems to me is as distinct a menace as
could reasonably have been required. Each letter must be
judged of by itself, and we do not feel ourselves at all
pressed by *Pickford's case*. It is the opinion of my learned
brothers and of myself, that this is a sufficient demand and
a sufficient menace, and we think that every part of the
statute is satisfied.

Conviction affirmed.

CORAM

WILDE, C. J.,
ALDERSON, B.,

WIGHTMAN, J.,
PLATT, B.,
WILLIAMS, J.

THE QUEEN *against* RICHARD CLUDRAY.

Case reserved by the Honourable Justice Williams.

POISON.

1850.

Saturday,
January 19.

“THIS was an indictment under the statute 7 Will. IV. & 1 Vict. c. 85, s. 2, for administering poison with intent to murder. The prisoner was proved to have administered to Ruth Horsfield, a child nine weeks old, two *coccus indicus* berries.

“The child, after having swallowed the berries, threw up one by vomiting, and the other passed through her body in the course of nature, and was found next day in her clothes.

“Two medical witnesses called on the part of the prosecution proved that the *coccus indicus* berry is classed with the narcotic poisons; that the poison consists in the presence of an alkaloid which is extracted from the kernel; that all the noxious properties are in the kernel; and that it has a very hard exterior or pod, to break which much force is required. One of these witnesses added, that the berry, if the pod is broken, is calculated to produce death in an adult human subject, though he did not know how many would be required for the purpose; that he thought the poison contained in the kernels of two berries, if the pods were burst and if retained on the stomach, might produce death in a child nine weeks old;

To administer *coccus indicus* berries, *with intent to kill*, is to administer poison within the statute 7 Will. IV. & 1 Vict. c. 85, s. 2; although the kernel only is poison, and the stomach will not act upon the pod, and the whole is therefore innocuous.

A person who at the same time administers a poison and its antidote, does not administer *poison* (per Alderson, B.).

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but that the berry could not be digested by the child, and that it would pass through its body without the pod being burst, and so would be innocuous (as had in fact happened in the present case).

“It was therefore objected by the Counsel for the prisoner, that the berries were not poison, within the meaning of the statute; for that though the kernel of the berries contained poison, yet the pod rendered the poison innocuous. I overruled the objection, and left the whole case to the jury, who found the prisoner guilty, and I directed judgment of death to be recorded. But I stayed the execution in order to submit the point raised by the prisoner’s Counsel to the consideration of the Court.”

Overend, for the prisoner. This was an indictment framed under the 7 Will. IV. & 1 Vict. c. 85 s. 2 (a), and the real question is, What is the meaning of the word “poison?” [*Alderson*, B.—You say this is not poison; suppose a small quantity of arsenic within a globule of glass.] He was prepared to meet that case or he could not support the present. According to Taylor (b) poison is a substance “which, when administered, is capable of acting deleteriously on the body.” [*Platt*, B.—We must not go by the definition in a medical book.] Perhaps not, but it was as well to call attention to the opinion of so eminent an authority. The words of the statute are “any poison or other destructive thing:” a poison would not be a poison within the meaning of the statute unless it was destructive. The statute is to be read as if it was written

(a) 7 Will. IV. & 1 Vict. c. 85, s. 2. “Whosoever shall administer to or cause to be taken by any person, any poison or other destructive thing, or shall stab, cut, or wound any person, or shall by any means whatever cause to any person any bodily injury dangerous to life, with intent in any of the cases aforesaid to commit murder, shall be guilty of felony, and being convicted thereof shall suffer death.”

(b) Taylor’s Med. Jurisp. p. 1.

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“any destructive poison or other destructive thing,” and therefore to administer poison in a perfectly innocuous state is not within the meaning of the statute. In s. 6 (a) of the same statute the words are “poison or other noxious thing;” so that the legislature itself has made a distinction between poisons which are noxious and those which are destructive. Under the latter section it would be enough that the party administered a noxious or hurtful poison, but under the first it must be something more than hurtful, it must be destructive. He would also call in aid the words which follow in s. 2, “or shall stab, cut, or wound any person :” those words would not be satisfied by a man biting off another’s nose; in that case the man would wound another, but not in the sense contemplated by the statute (b). So that it is not enough to follow the words of the statute. Suppose the man to bite off another’s nose with intent to murder him. [*Wilde*, C. J.—And that he bled to death.] That would be murder, and altogether a different charge: here the party did not die; that was administered which contained within it the power of destruction, but in the form in which it was administered could not by possibility destroy (c). [*Alderson*, B.—You say that it is not poison until the shell is broken.] In *Reg. v. Haydon* (d), Erle, J. stated that under the term “poison” would fall anything calculated to destroy life; that substances harmless in themselves might become poisons by the

(a) 7 Will. IV. & 1 Vict. c. 85, s. 6. “Whosoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing, or,” &c.

(b) See *Rex v. Stevens*, 1 Moo. C. C. 409; *Rex v. Harris*, 7 C. & P. 446; *Rex v. Murrow*, 1 Moo. C. C. 456.

(c) Mr. Overend observed that one of the medical gentlemen who attended at the trial had since taken several of the berries for the purpose of satisfying himself as to their effect, and that he was by this means satisfied that they were perfectly innocuous. It appears that the stomach will not act upon the outer part of the berry, the pod, containing the poison.

(d) 1 Cox, Cr. Ca. 184.

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time or manner of their administration. Taking this definition as correct, if time and manner of administration may make an otherwise harmless substance a poison; so the time and manner of administration may make a poisonous substance harmless. In the present instance it was not given under such circumstances as to be poisonous, but in the manner of its administration it was perfectly harmless. Where it cannot come in contact with the bodily system, it cannot be a destructive thing; and in this case, that it was impossible that it could so come in contact, the evidence so far as it was given, established. Suppose a person to administer a poison, and with it, by mistake, its antidote, so that the poison was innocuous; it could hardly be contended that he had administered a destructive thing: in that case the poison exists, but its action is neutralized; yet it might be possible to evaporate the antidote, and leave the poison in the body (*a*). [*Alderson*, B.—Here you treat the outside as the antidote. *Platt*, B.—Might the question, whether poison or not, depend upon the strength of the stomach? There was no evidence to show that at any age of the recipient it would have been poison.] The question is, was it poison to a child nine weeks old? He contended upon the evidence it was not.

Hall, in support of the conviction. He was to show that poison was poison, although it was in a case. This is classed as a poison amongst medical writers. [*Wightman*, J.—That is agreed, but it is contended that the berry is not poison unless it is broken.] Taking the whole of the berry together, it is poison, and administering the berry is like administering arsenic in a capsule which probably would break or otherwise suffer the arsenic to escape in the stomach. [*Platt*, B.—The question really is whether each and every part of the berry was administered.] The whole

(*a*) See *Christian on Poisons*, p. 33.

was passed into the stomach of the child. What difference can it make that the poison was incased? The statute does not say, poison likely to occasion death, but only "poison." [*Wilde*, C. J.—Is poison, administered by mistake in such a way that it could not operate as poison, within the statute?] In that case it might be said that to administer a poison which the stomach would immediately reject, would not be administering poison. Is the argument to be that because a man administers too large a dose of poison, he does not administer poison at all? [*Wilde*, C. J.—Or because he administers too small a dose that it is not poison?] There are certain cases in which large doses would not have any effect whatever (*a*). The question really is, whether an insoluble capsule covering alters the nature of the substance within. The distinct and comprehensive words in which the statute is expressed, he apprehended, were used for the very purpose of excluding questions of this sort. In one point of view the whole berry was poison, it was classed as a poison generally: the kernel was unquestionably poison, that was administered, and though within the pod, it cannot be said that poison was not administered.

Overend replied.

WILDE, C. J.—The question really is whether the prisoner administered poison with intent to kill. He administered the berry of the *cocculus indicus* and it is admitted that the kernel of the berry is poison, and it was proved that he administered it with intent to kill; but it also appears that he administered it in such a condition that it could not act as poison; and then the question arises whether a person who administers poison with intent to kill, but from ignorance administers it in such a manner as

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(*a*) See *Taylor on Poisons*, p. 40.

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to be innocuous, is guilty under the statute. We are all of opinion that a man who administers poison which, by reason of some mistake, is ineffective as a poison, is not the less guilty of administering poison because, under the circumstances, it is not likely to produce any ill effect.

ALDERSON, B. added, that in the case suggested of a person administering together two poisons which counteracted each other, there was really no administering of poison at all.

Conviction affirmed.

SITTINGS AFTER HILARY TERM,

IN

THE THIRTEENTH YEAR OF THE REIGN OF VICTORIA.

CORAM

WILDE, C. J.,

MAULE, J.,

ALDERSON, B.,

WIGHTMAN, J.,

WILLIAMS, J.

THE QUEEN *against* JOHN CHRISTOPHER, JOHN SMITH, AND
GEORGE THORNTON.

EVIDENCE.—DEPOSITIONS.

1850.

*Friday,**February 1st.*

“THE prisoners Christopher, Smith, and Thornton, were indicted at the General Quarter Sessions, holden in and for the Borough of Liverpool, on the 22nd day of October, 1849, for felony. When the prisoners were first brought before the magistrate and charged with the felony, the witnesses were sworn, examined by the magistrate, and cross-examined by the prisoners, and written minutes of the examination and cross-examination were made by the clerk to the magistrates, under the inspection of the magistrate.

“These minutes were then sent to the office of the clerk to the magistrates, and there delivered to a clerk named Tasker, who proceeded to write the depositions from the

A witness was examined before the magistrate, in the presence of the prisoner. The clerk to the magistrate afterwards, at his own office—the magistrate and the prisoner being absent—in drawing up the depositions put further questions to the witness, and inserted the answers. This statement was afterwards read before the ma-

gistrate in the presence of the witness and the prisoner, and the witness resworn as to its truth. Held, that the witness at the trial might be asked as to such answers without putting in the written document.

Qy., whether such a document is in law a deposition.

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minutes. The witnesses attended in the office, and in the course of writing the depositions, Tasker put some questions to each of them for the purpose of rendering the depositions more correct, clear, and complete. The answers given to the questions were inserted in the depositions. The magistrate was not present, nor were the prisoners at the office of the clerk to the magistrates. The depositions having been thus written, the witnesses appeared again before the magistrate, and in the presence of the prisoners were resworn, the depositions were read over to them, and a full opportunity was afforded for cross-examination before the depositions were signed by the witnesses.

“Under these circumstances appearing on the trial, the Counsel for the prisoners proposed to ask one of the witnesses for the Crown the following question: ‘Did you not tell Mr. Tasker, that you were watching the prisoner Christopher, till a quarter before one o’clock (a)?’ This question was material.

“The question had reference to what was said by the witness in answer to some question put by Tasker, as above stated, in the course of writing the depositions; and the witness’s answer would, according to the evidence, appear on the depositions. The depositions were not read, or tendered in evidence. The Counsel for the prosecution objected to the question proposed, and the question was overruled by the Court.

“The prisoners were all convicted of felony. Judgment

(a) At the trial the question was put, after the following examination:—

“When you gave your evidence against the prisoners, before they were committed, was it taken down in writing in open Court?”

“No.”

“Where did you go to, to have your evidence taken?”

“I went into a room under the Court, to a Mr. Tasker.”

“Were the prisoners or magistrate present?”

“No.”

Then followed the question set out in the case.

was postponed, and the prisoners were committed to prison until it shall have been decided

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“ Whether the question proposed to be asked was properly overruled, and whether the prisoners were duly convicted.

“ GILBERT HENDERSON,
“ Recorder of the Borough of Liverpool.”

Hills, for the prisoner. The first question in this case, is, whether there were any legal depositions at all. It is clear that if there were not, the witness might be asked any question as to what was said before the magistrate. If there were legal depositions, the question had no reference to them,—to what was done before the magistrate; but to a question put by a person having no authority, when neither the prisoner nor the magistrate was present; and therefore the witness might be properly examined as to what she then said (*a*). The first question, therefore, that presents itself is whether, or not, there were any legal depositions. Under the Statutes 2 & 3 Ph. and M. c. 10, and 7 Geo. IV. c. 64, it was not in terms required that the prisoner should be present; but, as a general principle, no depositions could be given in evidence unless the party had an opportunity of cross-examining the witness. The examination of the witness, however, need not have taken place in the presence of the prisoner. If, after the examination had been taken down in the absence of the prisoner, the prisoner was called in, the witness re-sworn, and the evidence read over, and then declared by the witness to be true, it was sufficient that the prisoner had then an opportunity to cross-examine. *Rex v. Smith* (*b*).

(*a*) *Reg. v. Griffiths*, 9 C. & P. 746; *Reg. v. Spilsbury*, 7 C. & P. 187; Arch. C. L. 118.

(*b*) Holt's N. P. R. 614; *S. C. Russ. & Ry.* 339; 2 Stark. N. P. C. 208 (see note 2 Stark. p. 211); and see also *Rose*, C. Ev. 71; Arch. C. L. 133.

1850. The question here arises under the stat. 11 & 12 Vict. c. 42, s. 17; by that statute the magistrates "shall in the presence of such accused person (who shall be at liberty to put questions to any witness produced against him) take the statement on oath or affirmation of those who shall know the facts and circumstances of the case," &c. (a). It was clear therefore that the examination must be now made in the presence of the prisoner, the statute, he submitted, having been intended to obviate the objection that was made under the old statutes. [*Alderson*, B.—What objection was there under the old statutes?] Taking the evidence in the absence of the prisoner. In *Reg. v. Johnson* (b), Platt, B. strongly condemned such a course of procedure. [*Alderson*, B.—There is no question this must be considered as concluded by authority (c). The fact is, that all the depositions in London and Westminster are taken precisely in that way at present. The only essential part before the late statute was that the prisoner should have an opportunity to cross-examine (d).] In the present case, the minutes never were signed by either of the parties, and consequently there were no legal depositions. After the examination before the magistrate was concluded, a clerk to the clerk of the magistrates, in the

In *Rex v. Forbes*, Holt's N. P. R. 599, note (decided before *Rex v. Smith*), Chambre, J., refused to receive such depositions in evidence.

(a) For section of statute, see note, p. 9.

(b) 2 C. & K. 394.

(c) His Lordship mentioned two unreported cases in which such evidence had been received, one of which occurred at Somerset, and the prisoner was hanged.

(d) The statute 11 & 12 Vict. c. 42, s. 17, provides, that the justices shall, *in the presence of the accused*, take the statement of the witness and shall put it into writing; and such deposition shall be read over to and signed by the witness, and signed also by the justice or justices. See note, p. 9. *Alderson*, B., observed that the law was the same before the late statute 11 & 12 Vict. c. 42. See *R. v. Smith*, Holt, N. P. 614 (on stat. Ph. & M.); *R. v. Elkington*, 2 Lew. C. C. 142 (on stat. 7 Geo. IV. c. 54); *R. v. Hake*, 1 Cox, C. C. 226 (*Ib.*).

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absence of the prisoner and of the magistrate, further examined the witness, and from such examination, and the previously-written statement and from his own recollection, a fresh statement was written. According to the case stated a full opportunity was afforded for cross-examination before the depositions were signed:—suppose a prisoner to attend before the magistrates with his counsel and attorney; the examination to be taken before the magistrate, and the prisoner's advisers to go away; the depositions are afterwards altered and read over to the prisoner in the absence of his legal advisers, (who, not supposing that any alteration would be made, regard the proceedings as a mere form,) is it to be taken for granted that such written statement is the statement upon which an opportunity was afforded for cross-examination? Such a course is far more objectionable than that of examining the witnesses in the absence of the prisoner, and then reading to him their evidence, because it tends to throw the prisoner off his guard. He need scarcely call attention to the fact that, in case of the death of the witness, such altered depositions would be unalterable evidence against the prisoner; the question therefore, was one of essential importance. [*Maule, J.*—You must prove the full opportunity of cross-examining. If the prisoner does not hear the whole of the question, he has not such full opportunity. Suppose the answer to be “Yes,” to a question involving two alternatives. The prisoner may know that the witness means to affirm the one and not the other, to which the clerk may write the answer “Yes,” thereby importing a different matter from that to which the witness really intended to speak.]

Then, supposing the depositions to be good, he contended that in such case the counsel for the prisoner was only prevented from examining the witness as to what was said before the magistrate. [*Alderson, B.*—You have no right

1850. to ask what was said before the magistrate; but what was
REG. v. said at another time is not excluded. The mere fact of its
CHRISTOPHER. being taken down in writing is not material if it is not taken
down in a proper form.] The statement produced not
having been a statement made before the magistrate, the
counsel for the prisoner was entitled to put the ques-
tion (a).

Paget, for the Crown, was requested by the Court to direct his attention in the first instance to the last point. For the purpose of this part of the argument, he might assume that, if the witness had been dead, the depositions might have been read in evidence under the 17th sect. of 11 & 12 Vict. c. 42. Counsel was not precluded from asking "Did you tell Mr. Tasker so and so?" but the question in this case was precluded by the form of the question itself, "Did you not tell Mr. Tasker (b)," &c., adopting the very words stated in the depositions as the reply made by the witness to a question put by Tasker. That statement appeared upon the depositions. [*Alderson*, B.—"That statement" is a fallacy. A similar statement might have been correct. Is it to be taken that, when the party was resworn, every question and every answer was repeated?] For the purpose of this argument, it must be assumed that the same words were repeated before the magistrate. That was the ground upon which he had to contend that the question was inadmissible. [*Wilde*, C. J.—The question is not whether the answer only was the same, but whether the question to which the answer was given was also the same. I presume the question put, when the witness was resworn before the magistrate (after reading the statement), was, "Is that true?" to which the witness answered "Yes." The answer upon the depo-

(a) *Reg. v. Shellard*, 9 C. & P. 277; *Reg. v. Holden*, 8 C. & P. 606.

(b) The magistrates' clerk's clerk.

sitions was an answer to some question put by Tasker when the magistrate was not present; not a statement made before the magistrate, nor in the presence of the accused.

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Alderson, B.—Then the answer to the question before the magistrate would not be found upon the depositions, but another answer. *Wilde, C. J.*—Has not the prisoner a right to hear the question as well as the answer? Now he does not hear the questions to which the several replies are made; all that he hears is the question, “Is that true?” to which the answer “Yes” is given. As much is suggested frequently by the question as by the answer. A magistrate often omits to put down part of the statement, because he thinks it not material. If it should at the trial appear important, is it to be excluded (a)? *Maule, J.*—There is no authority in the clerk which would exclude the evidence. *Alderson, B.*—Suppose a *man in the street* to have asked the question, would not the answer have been admissible? It must be presumed that what Tasker wrote down was by the witness’s authority; and that it was written correctly, as it was signed by the witness. He was prepared to say the witness could not be asked a question upon the depositions without putting them into his hand: that being done, the prisoner’s Counsel, finding they did not contain the statement, might put the question. He believed that to be the foundation of the second resolution in *The Queen’s case* (b). [*Alderson, B.*—That is to say, if he never made any statement except that which is in writing; here the witness does. It appeared to him the statement made by the witness to Tasker, and which was read over to him and acknowledged by him to have been “true,” was the statement of the witness. [*Alderson, B.*—Could the witness, by signing his name, in this case prevent that from being proved which was proveable before? *Maule, J.*—Suppose

(a) See note to *Jeans v. Wheedon*, 2 M. & R. 488, 489.

(b) 2 B. & B. 286.

1850. a man makes an affidavit, you ask him, Did he not say so and so, upon giving instructions to his attorney?] He referred to *Sainthill v. Bound* (a). [Maule, J.—There is nothing to show that in that case the statement was ever made, except in the affidavit. It may have been signed by a deaf and dumb man.] The judgment in *Leach v. Simpson* (b) was strongly in his favour. Suppose the present question to have arisen in a civil action. [Alderson, B.—The rule would have been the same.] A merchant sends a letter written by his clerk, and signed by his own hand: the whole of it becomes the statement of the merchant, and it would not be competent to prove any matter therein stated without producing the letter. [Maule, J.—This is not the same case, because the clerk does not write down what he is directed. Alderson, B.—The difference is, that in the case of the letter the communication is the communication of the merchant.]

On the other point;—whether there were any legal depositions. This was an act done in the course of taking down the depositions, whether the depositions were regularly taken or not. [Alderson, B.—Have you seen the note to *Jeans v. Wheedon* (c)? There the whole of the law is laid down very well and very correctly.] That is distinguishable from the present case, for there the document was not signed at all. [Alderson, B.—I did not refer to the facts of that case but to the general principle, as stated in the note. If that is correctly laid down, as I think it is, it disposes of this question.] He did not contend that other statements than those contained in the depositions might not be given in evidence, but that it was necessary as a preliminary measure to put the depositions in in the first instance.

(a) 4 Esp. 74.

(b) 5 M. & W. 311, 312.

(c) 2 M. & R. 487.

WILDE, C. J.—From the view which the Court takes of the question, it will not be necessary to trouble you further upon that point.

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We are of opinion that the question put was a legal and proper question, and that an answer ought to have been required. [His Lordship here stated the facts and the objection.] The question is whether the paper was the primary evidence; the ground upon which it is contended that it was, is that it is to be treated as if it was a deposition before the magistrate. The interval that elapsed between the time when the evidence was received, when it was put into writing, and when the party is supposed to answer the question, would not materially alter the case. Ought this document to be treated as a deposition before the magistrate? Is the analogy a correct analogy? The opinion of the Court is, that it is not. Where the evidence has been taken before a magistrate and it is received, it is because the Court has charged a public officer with recording what is said, and the presumption is that he did his duty, and therefore it is the best evidence. Is there any legal character attached to this paper at the time it is written to exclude parol evidence? The Court is of opinion that there is not. At the time Tasker wrote it, he was doing an act to which the law gave no sanction, he was doing it as a mere volunteer; and he could not by any such writing exclude parol evidence of that which the witness may have said. We are therefore of opinion that it was competent to ask the question. You cannot put it higher than the case of a man writing the paper himself, and Tasker is in no better situation. There is in point of law no legal authority attached to it, and there is no reason why the question should not be asked. The whole argument seems to be founded upon a position which is not at all analogous. We are of opinion the question

1850. was improperly overruled. It therefore becomes unnecessary to decide the other point. The prisoner must be discharged (a).

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See *Reg. v. Bond*, and *Reg. v. Sansome*, *infra*.

(a) In this case no judgment had been entered at the time of this hearing. See schedule to 11 & 12 Vict. c. 78, the Act by which this Court is constituted.

THE QUEEN *against* RICHARD WILLIAMS.

LEVY OF CHURCH RATE.

1850.

*Friday,
February 1.*

THE prisoner was tried at the General Quarter Sessions for the county of Cornwall, held at Bodmin, on the 17th of October, 1848, on an indictment which charged him with having unlawfully rescued a distress which had been seized under a warrant to distrain for the amount of a church rate. The case set out the warrant, which after reciting the making a complaint before a justice by the churchwardens of the parish of St. Austell in the said county; that the said Richard Williams had refused and neglected to pay the sum of 8*s.* 8½*d.* which he was duly rated and assessed to pay for a church rate in the said parish, the validity of which rate had not been questioned in any Ecclesiastical Court; an order by the said justice requiring him to pay the said sum, together with the sum of 5*s.* 9*d.* for costs; notice of the order, and refusal of the said Richard Williams to pay; concluded—"These are therefore to authorize and command you that you do forthwith levy the aforesaid sum of 14*s.* 5½*d.* by distress and sale of the goods and chattels of the said Richard Williams, and out of the money arising from such sale that you do pay or cause to be paid unto the said Richard Parsons and William Jago (*a*) the said sum of 14*s.* 5½*d.*, and thereout also deduct your necessary charges for distraining; and if any overplus shall remain after such payment, and deduction as aforesaid, that you do render the same unto the said Richard Williams," &c. The second count of the indictment was as follows:—"And the jurors aforesaid, upon their oath aforesaid, do further present that after the taking and distraining of the said goods in manner and for the cause aforesaid, and whilst the said

Justices of the peace, in issuing a warrant under the stat. 53 Geo. III. c. 127, s. 7, to levy a church rate by *distress* and sale, must pursue the terms of the stat. 27 Geo. II. c. 20, by limiting the sale (except in the case of a Quaker) to not less than four nor more than eight days from the time of the seizure.

A warrant to levy "forthwith" (upon a person not a Quaker) is therefore bad.

(*a*) The churchwardens.

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sum of 14s. 5½d. remained due and unpaid, to wit, on the day and year last aforesaid, at the parish of, &c., the said goods and chattels were then and there in the custody and possession of one Samuel Treverton, under and by virtue of the said warrant, and by him were then and there had and detained for the cause aforesaid, he the said Samuel Treverton then and there being one of the constables of the said parish, &c.; and that the said Richard Williams, on, &c., with force and arms, at the parish, &c., the said goods and chattels so as aforesaid in the custody of the said Samuel Treverton as such constable as aforesaid then and there being from and out of the custody and against the will of him the said Samuel Treverton, then and there unlawfully and injuriously did rescue, take, and carry away (the said sum of 14s. 5½d. so as aforesaid due being then unpaid), and other wrongs, &c., against the peace, &c.” The counsel for the defendant took objection to the validity of the warrant,—that a time had not been therein limited for the sale and disposal of the goods as required by the stat. 27 Geo. II. c. 20, s. 1. The objection was overruled, and the defendant, having been found guilty on the second count, was sentenced to be imprisoned for two months, and to pay a fine of 10*l.*, subject to a case reserved for the opinion of this Court. In the mean time execution was respited.

No counsel appeared on behalf of the prisoner.

Pashley, for the Crown.—The question in this case is, whether the warrant to distrain for a church rate is a valid warrant. The usual form (*a*) which is here followed, and which has always been used under the statutes 7 Will. III. c. 34, and 1 Geo. I. stat. 2, c. 6, is said to be wrong because it does not define the time for the disposal of the goods, which it is said should be not less than four nor more than

(*a*) 1 Chit. Burn. Jus. 678, last ed.

eight days; the terms of the warrant in this case being to levy "forthwith." The statute referred to, the 27 Geo. II. c. 20, s. 1, after reciting that justices are empowered to issue warrants for the distress of goods and chattels, and that in all cases a time is not limited for the sale thereof, provides, that in all cases where any justice of the peace is required by any Act of Parliament to issue a warrant of distress, he may therein order the goods to be sold within a limited time, such time to be not less than four nor more than eight days (*a*). [*Williams, J.*—The church rate to be paid by Quakers is not affected by this Act: it is expressly excepted from its operation.] That is so. It is suggested, on the other side, that this Act is intended to provide that in all cases there shall be no sale within four days. The statute really provides, that in all

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(*a*) Stat. 27 Geo. II. c. 20, s. 1. "Whereas by many Acts of Parliament justices of the peace are empowered to issue warrants for the distress and sale of goods and chattels, but the charges of distraining, keeping, and sale of such goods and chattels are not provided for in all the said Acts,* nor is there a time in all cases 'limited for the sale thereof whereby inconveniences have arisen.' Therefore, for remedy thereof, be it enacted by," &c., "That in all cases where any justice or justices of the peace is or are or shall be required or empowered by any Act or Acts of Parliament now in force, or hereafter to be made, to issue a warrant of distress for the levying of any penalty inflicted, or any sum of money directed to be paid, by or in consequence of such Act or Acts, it shall and may be lawful for the justice or justices granting such warrant therein to order and direct the goods and chattels so to be distrained to be sold and disposed of within a certain time to be limited in such warrant, so as such time be not less than four days nor more than eight days, unless the penalty or sum of money for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, be sooner paid."

Sect. 2. Charges of distress, &c.

Sect. 3. Not to extend to or repeal any provisions relating to distress for church rates payable by Quakers.

* 1 Ed. III. c. 16; 2 Ed. III. c. 6; 18 Ed. III. st. 2, c. 2; 34 Ed. III. c. 1 & c. 5; 12 Ric. II. c. 10; 13 Ric. II. c. 7; 14 Ric. II. c. 11; 17 Ric. II. c. 10; 2 Hen. V. st. 1, c. 4; 2 Hen. V. st. 2, c. 1; 14 Hen. VI. c. 4; 18 Hen. VI. c. 11; 1 Ed. IV. c. 2; 1 Ric. III. c. 3; 3 Hen. VII. c. 1; 4 Hen. VII. c. 12; 6 Geo. I. c. 21; 9 Geo. I. c. 7; 5 Geo. II. c. 18 & c. 19.

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cases where the justice is by a prior statute required to issue a warrant of distress, *it shall and may be lawful* for him therein to order the goods to be sold within a certain time. This is not compulsory. [*Williams, J.*—By the recital, it appears the statute was to remedy the inconveniences which had arisen from no time being fixed.] The third section, which contains the exception as to Quakers, places them in the same situation as they were in under stats. 7 Will. III. c. 34, and 1 Geo. I. stat. 2, c. 6. The stat. Will. III. provides a summary power for levying church rates upon Quakers; the stat. Geo. I. extends that power; but in neither statute is any time for the sale limited. The stat. 27 Geo. II. provides a general distress. [*Maule, J.*—The statute does not give the power where it did not exist before, but it regulates the mode of proceeding.] The stat. 53 Geo. III. c. 127, is the Act under which the goods of others than Quakers are distrained for church rates (*a*).

(*a*) Stat. 53 Geo. III. c. 127, s. 7. “Whereas it is expedient that church rates or chapel rates of limited amount unduly ‘refused or withheld, should in certain cases be more easily and speedily recovered: Be it enacted, That, from and after the passing of this Act, if any one duly rated to a church or chapel rate, the validity whereof has not been questioned in any Ecclesiastical Court, shall refuse or neglect to pay the same sum at which he is so rated, it shall and may be lawful for any one justice of the peace of the same county, riding, city, liberty, or town corporate, where the church or chapel is situated in respect whereof such rate shall have been made, upon the complaint of any churchwarden or churchwardens, chapelwarden or chapelwardens, who ought to receive and collect the same, by warrant under the hand and seal of such justice, to convene before any two or more such justices of the peace any person so refusing or neglecting to pay such rate, and to examine upon oath (which oath the said justices are hereby empowered to administer) into the merits of the said complaint, and by order under their hands and seals to direct the payment of what is due and payable in respect to such rate, so as the sum ordered and directed to be paid as aforesaid do not exceed ten pounds over and above the reasonable costs and charges to be ascertained by such justices; and upon refusal or neglect of such party to pay according to such order, it shall and may be lawful for any one of such justices, by warrant under his hand and seal, to levy the money thereby ordered to be paid, together with the amount of such costs and charges, by distress and sale of the goods of such offender, his executors or administrators, rendering only the

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[*Maule, J.*—It is a levy: it is not in the nature of a distress; it is not a pledge; although the party may perhaps pay before the sale.] The statute 27 Geo. II. c. 20, excepts from its operation the powers in reference to Quakers under the stats. 7 & 8 Will. III. and 1 Geo. I.; and it leaves the previous law with respect to them untouched. Then comes the stat. 53 Geo. III. c. 127, the object of which was to give the same power in all other cases (where the amount did not exceed ten pounds) as existed before in reference to Quakers. That statute says that the justices may by warrant order the payment of the money by distress and sale, but nothing is said about any time: no time is defined. [*Wilde, C. J.*—I understand the 27 Geo. II. c. 20, to apply to all rates that were then made or thereafter should be made. *Maule, J.*—The Act 27 Geo. II. contains an exception as to Quakers. Suppose a subsequent Act to pass in the form of the stat. 53 Geo. III., giving a power to distrain; suppose it was a game law; you might as well say that such Act did not apply to the Quakers, although it should give the magistrates the same power to distrain for a game penalty as they previously had of enforcing the payment of church rates. You seek to make use of the stat. 27 Geo. II., and at the same time you also seek to reject it.] The distinction is that your Lordship is putting the whole *in pari materia*. [*Maule, J.*—The question then is whether the *materia* is the church rate or the Quaker. It is usual to put a man into possession for four days; but the most humane thing you can do to a Quaker is to take his goods at once, instead of keeping a man in for four days to convert him from the error of his ways. *Williams, J.*—Where there is a debt created by statute, and also a mode of enforcing it, it is not to be enforced

overplus to him or her, the necessary charges of distraining being thereout first deducted and allowed by the said justice.”—Appeal.—Proviso for Ecclesiastical Jurisdiction.

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without notice ; but here the statute, as to the mode of enforcing it, already existed. *Maule, J.*—This is an ecclesiastical debt to be enforced originally in the Ecclesiastical Court. The stat. 53 Geo. III. gives the magistrates power to order the payment of it, and so makes it a civil process.] The civil power is called in to enforce the ecclesiastical law by a summary mode of compelling the payment of the money. The case does not fall within the words of the stat. 27 Geo. II. c. 20, “Where any justice of the peace is or shall be required by any Act of Parliament now in force, or hereafter to be made, to issue a warrant of distress for the levying of any penalty inflicted, or any sum of money directed to be paid by or in consequence of such Act.” This is not a penalty inflicted, nor is it a sum of money directed to be paid by or in consequence of such Act : it is a sum of money payable under the ecclesiastical law, and the justice of the peace has the power to enforce the payment by distress under the particular authority of this Act. The statute 53 Geo. III. is not limited expressly to a levy of the amount due for church rates ; but under that act may be levied not only such amount, but also all costs and charges. The Act is larger in its operation than the 27 Geo. II., which is in effect repealed by this Act, so far as this Act is concerned : yet, under this Act the remedy is for a small sum, not like the statute 27 Geo. II., under which orders may be made for the levy of a very large amount ; when that is the case, one can readily suppose the reasonableness of granting four days. [*Maule, J.*—From s. 6 of 53 Geo. III. it would appear that the stat. of 27 Geo. II. c. 20, was not overlooked by the legislature in passing that Act]. With respect to any weight to be attached to an incidental expression of the legislature in reference to a previous statute, he cited *Dore v. Gray* (a), *Russell v. Ledsam* (b). The

(a) 2 T. R. 358.

(b) 11 M. & W. 647 ; 14 M. & W. 574, in error ; 16 M. & W. 633.

declaration of the legislature, as to the meaning of a previous statute, is a matter by which the Courts will not be influenced, because it is the province of the judges, and not the authority of the legislature, to construe an Act of Parliament. [*Maule, J.*—That is extending the doctrine very far, because it is saying the legislature did not know what they were themselves saying; your argument would put an end to all the interpretation clauses. *Alderson, B.*—Here the justices make the order, directing the sale “forthwith;” and it is said that you must have a warrant of distress authorising a sale, not within four days. That is so. The warrant must follow the directions of the statute. *Maule, J.*—They follow the form in Burn’s J.; but it is not the first form in that work which has been objected to, and decided to be wrong.]

WILDE, C. J.—We are of opinion the warrant is within the operation of the statute 27 Geo. II. c. 20, and therefore the conviction is bad. A verdict of “not guilty” must be entered.

Conviction quashed.

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EASTER TERM,
IN
THE THIRTEENTH YEAR OF THE REIGN OF VICTORIA.

CORAM

WILDE, C. J.,
ALDERSON, B.,

WIGHTMAN, J.,
CRESSWELL, J.,

ERLE, J.

THE QUEEN *against* BENJAMIN HOPKINS BOND.

Case reserved by the Honourable Justice Cresswell.

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Saturday,
April 27. (a)

A prisoner cannot be convicted upon an indictment charging a larceny of specific coins, unless there is evidence from which the jury may find that some one of the particular coins charged was the subject of the larceny: it is not sufficient that the evidence satisfies the jury that some of one or of the other coin mentioned was stolen.
[*Erle, J. dissente.*]

“1. THE indictment charged the prisoner with stealing seventy pieces of the current coin of the realm called sovereigns, of the value of 70*l.*; one hundred and forty pieces of the current coin called half-sovereigns, of the value of 70*l.*; and, in like manner, 280 crowns, 400 half-crowns, 400 florins, 400 shillings, and 400 sixpences, the property of I. G. Currie and Co. in their dwelling-house.

“2. In another count he was charged as clerk and servant.

“The prisoner was a clerk in the banking-house of Isaac G. Currie and Co., and, on the 17th of October, was employed as one of the cashiers. There was evidence from which it might be inferred that he had on that day abstracted 70*l.* in money from the bank, but there was no

A statement made by a prisoner before a magistrate, not signed either by the magistrate or the prisoner, is not excluded as evidence because the magistrate omits to inform him that he has nothing to hope or to fear from either promise or threat. [11 & 12 Vict. c. 42, s. 18.—*Proviso.*]

(a) This case was argued before the above-named judges on Saturday, January 19, 1850.

evidence to show the nature of any one piece of the coin taken.

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“ 4. Amongst other evidence the counsel for the prosecution tendered in evidence a statement by the prisoner before the committing magistrate, made under the following circumstances.

“ 5. The prisoner was taken before the magistrate on the 20th of October, and charged with stealing 70*l.* in money from his employers, and remanded, after some witnesses had been examined. He was brought up a second time, on the 24th of October, and then further evidence was given, and that which had been given on the former occasion was read over. The magistrate then addressed him in the language prescribed by the 11 & 12 Vict. c. 42, s. 18; but did not tell him, as required by the proviso, that he had nothing to hope from any promise of favour, or to fear from any threat.

“ 6. The prisoner's answer was taken down. The solicitor for the prosecution then asked for another remand, as the next day would be the last on which he could go before the Grand Jury at the Sessions, which were then in progress, for which he could not be prepared.

“ 7. The prisoner objected, and assigned a reason, and being asked whether he wished that to be taken down as part of his statement, he said that he did, and it was accordingly written down. He was then remanded, and the statement was not signed by the prisoner or the magistrate. The prisoner was brought before the magistrate again on the 31st of October. No new witnesses were examined, nor any questions put for the prosecution; but an attorney by whom the prisoner was then attended, put a few questions to one of the witnesses who had been before examined. The evidence was then read over and the witnesses were then re-sworn. The statement made by the prisoner at the former examination was then read to him;

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his attorney objected to its being taken as his statement, because an addition had been made to the evidence in answer to his questions. The magistrate then again asked the prisoner, in the terms prescribed by the statute, whether he wished to make any statement, and he declined doing so.

“8. The prisoner’s Counsel objected to the former statement being received; but I admitted it, reserving for the consideration of the Judges the propriety of so doing.

“9. It was then read by the clerk, who took it down as follows: ‘I shall say nothing here, I had rather say it at my trial.’ And, when a remand had been asked for, he objected to it, and said, ‘It is my intention to plead guilty to the charge.’

“10. At the close of the case for the prosecution, it was objected that there was no evidence to show that the prisoner had taken any particular description of coin, and that the jury could not with propriety find him guilty of stealing either one or the other in the alternative. In order that this question might be considered by the Judges, I told the jury that if they were satisfied that the prisoner had stolen a sum of money from his employers in their banking-house, consisting of some of the coins mentioned in the indictment, although they could not say which, they should find him guilty.

“11. The jury found him guilty, and I have now to request the opinion of the Judges; first, whether the statement made by the prisoner was properly received; and, secondly, whether the direction given to the jury was correct.”

Parry, for the prisoner. He would take the objections in the order reserved. The first objection was, that upon the evidence the indictment was not supported. The indictment was, at common law, for stealing certain moneys therein described. It was not disputed, that if it could

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have been proved that any single coin had been taken, the prisoner must have been convicted; but there was no evidence as to any specific coin. [*Cresswell, J.*—It was found that some coin was taken.] He would so treat it. The indictment stated only silver and gold coin; it might have been that copper coin was stolen, and there was no statement of copper coin in the indictment. It is a general rule, that the article stolen must be described with certainty; that rule was not complied with in the present instance. At common law, it was necessary that the article stolen should be strictly laid and proved as laid. By 7 & 8 Geo. IV. c. 29, s. 48, “in every such indictment, except where the offence shall relate to any chattel, it shall be sufficient to allege the *embezzlement* to be of money, without specifying any particular coin or security;” that showed that at common law it was necessary to state the sort of coin, and this Act was passed to do away with such necessity in indictments for embezzlement; but, even under this statute, some kind of coin must be found to have been taken. In Hale’s P. C. (a), it is said, “An indictment against A., *quod felonice cepit et asportavit bona et catalla B.*, without showing what in certain, as *scilicet unum equum, unum bovem, &c.*, is not good.” So again, “the number of things stolen must be expressed; therefore it is not sufficient to say *felonice furatus est oves*, or *columbas*, out of a dove-cote, or young hawks out of the nest, without expressing their number.” That is, that it is necessary to describe the article with certainty; and it must with equal certainty be proved. [*Erle, J.*—If ten hawks stated, would not proof of nine do?] Yes, all he contended for, was that you must prove one hawk at least. He would put the ordinary case of alleging a sum of money, as ten half-crowns, there it would be sufficient to prove the finding on his person one half-crown, marked; but one of such

(a) Vol. II. p. 182.

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coin must be proved. Here all that was proved was a deficiency of seventy pounds, and not any one coin was traced into the prisoner's possession. [*Alderson*, B.—If he had eaten the article stolen, you could not trace it into his possession ; for instance, a round of beef stolen out of my house.] Then it would be a question for the jury ; as, when the jury find that a person has stolen a watch from a room where it had been the instant before, although the watch is not actually traced to his possession. In Arch. Cr. L. (a) “money is described as so many pieces of the current gold or silver coin of the realm, called, &c.” The species of coin must be specified. For this he cited *Rex v. Fry* (b). He also referred to *Rex v. Forsyth* (c). [*Wilde*, C. J.—How are the jury to say that he was not guilty of stealing anything on this count, when they are of opinion he stole all that is stated in the count.] There was no evidence that any specific coin was stolen. [*Cresswell*, J.—Whether I was right or not in saying there was no evidence is immaterial, because I gave the direction in order that the case might be argued. *Alderson*, B.—The substance of the direction is, that if the jury were satisfied that the prisoner had stolen the moneys stated in the indictment, without finding that he had stolen any specific coin, they were to find a verdict of “Guilty.”] Had the indictment been that the prisoner had stolen a horse *and* a cow, it would not have been sufficient to have proved that he had stolen the one *or* the other. [*Cresswell*, J.—Suppose a shop to be broken into, and the evidence to be that the prisoner was the person who broke in, and that there were in the shop either five coats and six pairs of breeches, or six coats and five pairs of breeches, eleven in all ; but it could not be proved which, and one of the one or the other was stolen, in that case if the jury were to find the prisoner

(a) P. 51, 10th edit.

(b) R. & R. 482.

(c) R. & R. 274 ; Archbold's Crim. Law, 51, 10th ed.

guilty, "it might be of stealing an article which was in fact not stolen at all. *Alderson, B.*—There is an old precedent in Coke of a count for murder which runs:—and so the jurors aforesaid say, that if he did not die of the first blow he did of the second; and if he did not die of the second he did of the third.] There it was found that one of the blows charged was the cause of the death. Here it is not found that he stole any one of the coins. Where an indictment (a) charged a prisoner with stealing "one bushel of chaff, one bushel of oats, and one bushel of beans," and the evidence was that the articles were mixed together, *Bayley, J.*, held the description insufficient, and said that it should have been a certain mixture, consisting of one bushel of chaff, &c. [*Alderson, B.*—I much doubt that case; because, if a man stole a glass of wine in water, I should be loth to believe that he did not steal wine.] It is a very strong case certainly. [*Alderson, B.*—Much too strong. No doubt some mixtures would make a total alteration, as various chemical mixtures.] Suppose a piece of flannel or a piece of cotton to be stolen, and there being evidence of that fact only, and not as to either one or the other more particularly, the prisoner could not be convicted. Suppose two persons charged with committing an offence, the act of one person only, and it was evident that it was done by one or the other, and it could not be proved which had done it, they must both be acquitted. "The species of goods must be proved as laid" is an expression used in Arch. Cr. Law, under "Larceny," and it has never been disputed to be good law. Another observation is, that the charge must be substantially proved; the reason that it is so, is that the prisoner may afterwards plead *autrefois convict* or *autrefois acquit*. Here the prisoner could not plead either the one or the other, because he would not know of what he was convicted or

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(a) 3 Chit. Crim. Law, 947, is cited in Archbold's Crim. Law, for this case. *R. v. Kettle.*

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acquitted, whether of stealing one coin or another, because the verdict is general. [*Alderson*, B.—You are to put it that the party is found guilty of stealing according to the terms of the direction; the only case you can therefore put is *autrefois attain*t or *autrefois convict*. *Wightman*, J.—Supposing him to plead *autrefois convict*, the question would then arise whether it was the same offence, and that fact would be supplied by parol evidence.] Who could say that he was found guilty of stealing any specific coin as alleged in the indictment? it would be impossible for him to prove his plea. [*Erle*, J.—It is a matter entirely of evidence. Suppose a person to be convicted of stealing a coat, in the pocket of which there was a pocket-book; and he is subsequently charged with stealing the pocket-book.] He relied upon the proposition, that it is necessary to describe the article stolen with clearness and certainty, that it must be proved as laid; and that a vague and general description like the present, no specific part of which could be proved, was not sufficient; and that no specific article having been found to have been stolen, no larceny as laid in the indictment had been proved.

As to the reception of the evidence, he would call attention to stat. 11 & 12 Vict. c. 42, s. 18. There were many cases decided before the late statute; but he meant to rely almost entirely upon the words of that statute (a).

(a) 11 & 12 Vict. c. 42, s. 18. “After the examination of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the justice of the peace or one of the justices, by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses, read, or cause to be read, to the accused, the depositions against him, and shall say to him these words, or words to the like effect: ‘Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so; but, whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;’ and whatever the prisoner shall then say in answer thereto shall be taken down in writing,* and read over to

* Schedule (N) to the statute is, by the statute, here referred to, vide supra, p. 254.

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[*Alderson, B.*—It may be that the provisions of the statute apply only to those cases where there has been a previous promise or threat, and that therefore, at the examination, such a statement is to be made in order to do away with any existing impression.] The prisoner was not cautioned, and it was the duty of the magistrate to have stated to him that he had nothing to hope or to fear; and his not having done so excluded the admission of any statement made by him. The proviso overrules all the preceding part of the section, and renders it obligatory on the magistrate to make the statement. But there is a second ground of objection, that the magistrate did not return the whole of the statement made by the prisoner. He only returned what was stated at the third examination. It was the duty of the magistrate to comply fully with the provisions of the statute, and his not having done so precluded the statement from being given in evidence. The only evidence was that returned by the magistrate. In *Rex v. Walter (a)*, a magistrate returned, with the depositions taken before him, that the prisoner said, “I decline to say anything;” and it was held that under those circumstances a witness for the

him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards, upon the trial of the said accused person, the same may, if necessary, be given in evidence against him, without further proof thereof; unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: Provided always, that the said justice or justices, before any accused person shall make any statement, shall state to him and give him clearly to understand that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt; but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat: Provided nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged made at any time which by law would be admissible as evidence against such person.”

(a) 7 C. & P. 267.

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prosecution could not be allowed to give evidence of the terms of a confession which he stated the prisoner made in the presence of the magistrate and while under examination. So, in the present case, the evidence which he objected to was in matter not returned by the magistrate. [*Alderson*, B.—In *Rex v. Walter* it was sought to give the matter in evidence in order to contradict the statement made.] Here the intermediate statement was not signed by the magistrate, nor by his clerk, nor by the prisoner himself. In *Reg. v. Morse* (a), when, on the examination before the magistrate of persons charged with felony, the magistrate's clerk, in taking down the prisoner's statements, had left a blank where either of the prisoners had mentioned the name of another of the prisoners, the Judge at the trial would not allow the blanks to be supplied by parol evidence. That case shows that no supplementary evidence ought to be received to alter or vary the written document. In *Rex v. Moore* (a), "an incidental observation made by a prisoner in the course of his examination before a magistrate, but which does not form a part of the judicial inquiry so as to make it the duty of the magistrate to take it down in writing, and which was not so taken down, may be given in evidence against him at the trial" (b). That was a very strong case in favour of the view which he had taken of the present question. He also referred to *Rex v. Spilsbury* (c), *Reg. v. Carpenter* (d), *Reg. v. Weller* (e), on which he also relied.

Huddleston, for the prisoner, would reverse the order of his learned friend: he would take the latter point first. He submitted that the evidence was perfectly admissible. He apprehended the right construction of the statute to be, that if any previous impression had been made on the mind of the party, in consequence of any threat or inducement

(a) 8 C. & P. 605.

(b) 2 Russ. on Crimes, 879.

(c) 7 C. & P. 187.

(d) 2 Cox, Cr. Ca. 228.

(e) 2 C. & K. 223.

held out to him, the effect of it must be removed by the magistrate; and then any subsequent statement might be received: but it does not apply where no previous inducement has been held out to the party. The Court would see that was what the statute contemplated; although, since doubts have been thrown out as to what ought to be done, the course adopted is to read to the prisoner the first part of the statute—in the very words—and then to confuse him by explaining them in such a way as the magistrate may think fit. The statute evidently refers to any *previous* threat, the words are, “may have been held out to him,” so that if there has been a threat or promise the magistrate is to explain it away, but until it is shown by the prisoner that some previous threat or promise has been made, it is not necessary. [*Cresswell*, J.—Here it was a statement made for the purpose of being taken down, and if the magistrate does not take it, is it to be used as evidence in any other way? It is obtained as a statement to be made under the Act; can it be given otherwise in evidence?] It did not appear that it was so taken down at all. [*Cresswell*, J.—It was taken down, and the magistrate asked the prisoner if he wished it to be taken as part of his evidence, and he said that he did.] And afterwards he repudiated the statement. If the Court holds that a person is to get rid of a statement by a subsequent repudiation, it would create frequent grievous failures of justice. Suppose a man to commit a murder and to confess all the facts before a magistrate without any threat or promise, is he afterwards to do away with the confession by a repudiation? All that is required to be taken down is what the prisoner may say *in answer*. In the present case it was an interlocutory observation made and not any answer, and therefore was no part of the statement required to be taken down by the statute (*a*). If that were so, the Court would

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(*a*) *R. v. Spilsbury*, 7 C. & P. 187, *per* Coleridge, J., 188, 189.

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be with him, and hold that it is not necessary for the magistrate to give two cautions, one under the statute, the other applying to any observation the prisoner might make. Many cases had been quoted upon which it was not necessary to trouble the Court; but, there was a late case upon the subject, a decision by all the Judges, *Rex v. Harris* (a), in which it was held that parol evidence was admissible to add to the examination of a prisoner taken before a magistrate. [Alderson, B.—The statute of P. & M. (b) only requires so much to be taken down as is necessary to the charge.] *Rex v. Harris* goes to show that what the magistrate takes down is not conclusive of the case, but that further parol evidence may be adduced; *Rowland v. Ashby* (c), *Venafrá v. Johnson* (d), *Leach v. Simpson* (e). [Alderson, B.—In *Rex v. Harris* there were three separate charges; there was evidence as to the prosecutor's sheep, and separate evidence as to the sheep of two other persons. The evidence applicable to the latter cases was taken down by the magistrate, but as to the former, it had been omitted. It was therefore quite clear that the evidence as to the prosecutor's sheep which had been entirely omitted might be received. It would have formed the subject of a separate examination.] It does not appear so in the report. [Wilde, C. J.—But the report is quite consistent with it.] According to the case, it was upon an inquiry as to the stealing in all three cases. [Wilde, C. J.—They were separate and successive examinations (f).] *Reg. v. Wilkinson* (g), was a most im-

(a) M. C. C. 338.

(b) 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 10; and see 7 Geo. IV. c. 64.

(c) 1 R. & M. 231.

(d) 1 M. & R. 316.

(e) 5 M. & W. 309; 7 Dowl. 513, S. C.

(f) Alderson, B., referred to his notes, from which it appeared that the statements of the prisoners were not taken down before the evidence had been heard as to all the charges. See 2 Phil. on Ev. 84, note *.

(g) 8 C. & P. 662.

portant case, a decision of two of the Judges on this very subject, upon a case all fours with the present. He could not understand the meaning of the last proviso unless it was to prevent that section having operation upon anything which would have been evidence before the passing of the statute. It left it to the magistrate to adopt the course prescribed by the statute, or such other course as would have made the matter evidence before the statute. (Read section), “by law” (a), means by law, as in force at the time of the passing of this Act. By the law before the passing of this Act the statement would clearly have been admissible in evidence; but this is not such a statement as the Act contemplates, it is an interlocutory observation, and *Reg. v. Spilsbury* (b) is a direct authority for its admission. Here the prisoner says that he will plead guilty, and desires that it should be taken down, and subsequently repudiates the statement. It is clear there was no threat or inducement. It therefore comes to the naked proposition, whether a statement made by a prisoner is to be received in evidence. Suppose the statement to have been improperly or informally taken down, he apprehended that evidence of the statement might still be given; for that he cited *Rex v. Read* (c), *Reg. v. Pressly* (d). [Alderson, B.—Another view may be taken of the statute, viz. whether in any case it is more than directory; and then, if not observed, the whole effect of it is, that the statement must be proved in the ordinary way, and that it would not be sufficient to prove it by the production of the depositions alone.] In support of that view he referred to the words of the statute, he “shall” do so and so, and then he “may,” &c., that is, that if a certain formula has been adopted then it may be received in evidence; and upon reference to the

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(a) Last proviso.

(b) 7 C. & P. 187.

(c) Moo. & M. 403.

(d) 6 C. & P. 183.

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schedule referred to, in sect. 18 of the statute, the form is “may be given in evidence” (a) : the question is whether, except for the sake of convenience, it is necessary that the Act should be complied with at all.

He then proceeded to the other portion of the case. He admitted much that had been said on the other side : he admitted that upon the face of the indictment it was necessary to state a charge specifically, and the reason was that the Court might see that the subject-matter of the charge was a subject-matter of larceny. Applying that principle to the present case, he contended that the indictment was good, and would have been bad if it had stated that the sort of coin was to the jurors unknown. The offence does not consist in the coin, or the chattel, it is the taking ; and although for the sake of pleading it is necessary that the count should state with particularity the article stolen, it is not necessary that the evidence should be equally particular. It might be said, you must prove the particular coin, you must prove the way in which it was taken. If the particular coin is to be traced to the party, it cannot be proved unless the party was seen to take it ; all that is necessary is that there should be a sufficient foundation from which the jury may presume that something stated in the indictment was stolen. He took the charge of the learned Judge as if it was a special verdict. The jury were satisfied that the man stole some of the coins ; that is sufficient for the indictment : “some” must mean a portion. In the case that was put of a man who had stolen a coat or a pair of breeches, but it could not be proved which, there, there was no evidence from which the jury could act. It is the taking which is the offence. [*Cresswell*, J.—It is the taking of the article ; you cannot separate them. *Alderson*, B.—It must be a stealing of

(a) Schedule (N), 11 & 12 Vict. c. 42, s. 18. See p. 269.

something specially stated in the indictment. To hold this sufficient would be to admit that an indictment for stealing a coat *or* a pair of breeches would be good. If the word *or* is to be used, then this finding would be sufficient, because the prisoner is found to have stolen something mentioned in the indictment ; but what it is they do not know.

Cresswell, J.—If found guilty of stealing a coat *or* a pair of breeches, would you plead *autrefois acquit* or *autrefois convict* ?] Both. [*Cresswell, J.*—As to which ? *Erle, J.*

—In all cases of *autrefois convict*, it is a matter of parol evidence. *Alderson, B.*—Suppose him to be found guilty of stealing the breeches, and to be afterwards indicted for stealing the coat, could you plead *autrefois convict* ? You seem to have an idea of an abstract taking, a taking nothing.] Can it be said, where the jury are satisfied that he took something mentioned in the indictment, that he took nothing ? [*Alderson, B.*—The fallacy is in the word something ; something may mean an animal *feræ naturæ*.

Wightman, J.—Suppose there were several counts ; one for stealing sovereigns, another half-sovereigns ; could he have been convicted ? *Wilde, C. J.*—There is just this difference, that there they could not say what he had stolen specifically ; but here they say he stole a portion of that which is included in one count. *Alderson, B.*—If we are to

construe this by the indictment and by the summing up, we must come to the conclusion of saying that an indictment charging a stealing of one sovereign *or* one half-sovereign would be good.] Here the jury found that he did steal some of the coin, but they do not say how much. To what an absurdity it would lead, if this were held not to be sufficient ! A man discovers a party taking something from his till, some money from a larger sum which he has just counted ; is the party to be acquitted because it cannot be ascertained what specific coin he took ? [*Wilde, C. J.*—And suppose the man to run away, and not himself know

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at the time what he had taken ; but he says he took some money, but he does not know what coin it was.] In *Reg. v. Faulkner* (a) the evidence was—[*Cresswell, J.*—You have nothing to do with the evidence, you have only to look to the case as stated ; we have only to consider whether my direction was right or wrong.] He was about to observe that, in *Reg. v. Faulkner*, there was no evidence at all of any felony, except the prisoner's confession. There was no evidence of any specific coin, or any coin at all having been stolen, and the point there was whether the confession was sufficient evidence without any proof of the loss. That appears to be an authority to show that if the jury are satisfied that the party took some of the coin it is sufficient without any finding as to the particular coin. [*Wightman, J.*—Referred to the next reported case (b).] That was a misdescription in the indictment. [*Wightman, J.*—The only question there was as to the admission of evidence.] He could not put the case stronger, than that the Jury found that the prisoner stole some one thing charged in the indictment, but which they did not know. *Reg. v. Grove* (c) is an authority as far as it goes. [*Alderson, B.*—There the only question was whether there was evidence to go to the jury, that the money had been taken ; if taken before it went into the till it would be embezzlement ; if not, larceny.]

Parry, in reply, referred to *Reg. v. Jones* (d) and *Reg. v. Chapman* (e), as being subsequent cases to *Reg. v. Grove*. [*Alderson, B.*—In *Reg. v. Grove* some of the Judges

(a) Russ. & Ry. 481.

(b) *Rex v. Foy*, Russ. & Ry. 482. "An indictment for stealing 10*l.* in moneys numbered is not sufficient ; some of the pieces of which that money consisted should be specified."

(c) 1 Moo. 447.

(d) 8 C. & P. 288.

(e) 1 C. & K. 119.

thought there was evidence, and some thought there was not.] *Rowland v. Ashby* was a case in bankruptcy, and under the Bankrupt Act there is no provision like the present; *Leach v. Simpson* was the case of a prisoner called upon when under duress; *Reg. v. Wilkinson* was, he admitted, a case seriously to be considered; *Rex v. Read* was a case before a coroner, who is not bound by any statute to return any evidence. He did not contend that the statement was inadmissible, but that the magistrate should have taken it down in writing and returned a subsequent statement, and by that the Court was bound. When the statement was made, it was contemplated to be a statement made under the statute. He referred to Phil. on Ev. (a), where the whole of the matter was discussed and the distinction taken.

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ALDERSON, J., now (b) delivered the judgment of the Court.—In this case two points were made. Upon the first the Court have never entertained any doubt; that is, as to the admissibility in evidence of a particular part of the examination of the prisoner. [His Lordship here stated the facts connected with this point.] The question then was whether the examination might be read; the Court are of opinion that it might, because all the necessary ingredients which the statute required had been performed on the first examination. What took place in the second instance is not material.

On the second point the Court had some doubt, and they are not now unanimous. The charge in the indictment was that of stealing seventy pieces of the current coin of the realm called sovereigns, one hundred and forty pieces called half-sovereigns, and so going through all the denominations of coin. And the evidence was uncertain as to whether the

(a) Vol. II. p. 83.

(b) Saturday, April 27, 1850; present, Lord Campbell, C. J.; Parke, B.; Alderson, B.; Cresswell, J.; Erle, J.

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money stolen consisted of a sum having within it any, of either one, of the coins mentioned in the indictment, although it was clear that it had some of them. My Brother Cresswell, for the purpose of raising the question, told the jury "that if they were satisfied that the prisoner had stolen a sum of money from his employers in their banking-house, consisting of some of the coins mentioned in the indictment, although they could not say of which particular species, they should find him guilty." The question is whether that was a proper direction to give, and the majority of the Court are of opinion that it was improper. The majority of the Court are also of opinion that the jury could not find the prisoner guilty, unless they could find that he stole any one of the particular coins mentioned in the indictment. If the prisoner had been indicted upon each coin separately the jury must have acquitted, and the majority of the Court are therefore of opinion, the verdict must be for the prisoner, because the jury cannot say that he stole a sovereign or a half-sovereign, or any one of the coins mentioned. It is unfortunate that the law should be so. Perhaps it might be proper that the legislature should make it sufficient to state that the party had stolen a sum of money; but, until that is done, we must decide as in the present instance.

ERLE, J.—I am of opinion the conviction was right. The indictment was good upon the face of it, and by the verdict the prisoner was guilty of the crime charged in the indictment. In the indictment, he is charged with stealing sovereigns, half-sovereigns, crowns, half-crowns, and so on; and the verdict finds that he did steal, but they cannot say which sort of coin. They ascertain that he did steal some of them, and it seems to me that if he was found guilty of stealing any one, the rest is immaterial. He is therefore found guilty of stealing as laid in the indictment. It seems to me, that if this indictment is not good, no good indictment could be drawn to meet the case, although the party

is guilty ; and if no indictment could be framed to bring the felon to justice, the law becomes an absurdity. If the party is found guilty and allowed to escape, it appears to me, that it is the rules of pleading alone which allow a felon to go unpunished ; and, as the rules of pleading are subsidiary to the performance of justice, I think the party ought not to be acquitted.

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Judgment for the prisoner.

See *Reg. v. Christopher*, p. 225 ; and next case, *Reg. v. Sansome*, p. 260.

CORAM

LORD CAMPBELL, C. J.,
PARKE, B.,

ALDERSON, B.,
CRESSWELL, J.,

ERLE, J.

THE QUEEN *against* JOHN SANSOME.

Case reserved by the Right Hon. Lord Campbell.

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EVIDENCE OF PRISONER'S STATEMENT.

“THE prisoner was tried before me, at the last Assizes (*a*) for the County of Nottingham, for the murder of Elizabeth Bailey, by introducing his finger into her womb, with the intention of procuring abortion.

“For the prosecution there was offered in evidence a declaration made by him before the committing magistrate (in the annexed form). The magistrate's clerk, who was called to prove it, stated that when the prisoner was before the magistrate, the witnesses for the prosecution being examined in his presence, the magistrate thus addressed him:—‘Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial.’ That the magistrate added nothing more; that the prisoner then made the declaration, which was taken down, read over to him, and signed by him; and that it was signed by the magistrate.

“The prisoner's Counsel objected that, under the stat.

(*a*) Spring Assizes, 1850.

A statement made by a prisoner before a magistrate, and signed by the magistrate and the prisoner, is admissible as evidence against the prisoner upon his trial, although the magistrate omits to inform him (as in 11 & 12 Vict. c. 42,) that he has nothing to hope from any promise, and nothing to fear from any threat which may have been made or held out to him.

11 & 12 Vict. c. 42, s. 18, the declaration was not admissible, as the magistrates had not stated 'that he had nothing to hope from any promise of favour, and nothing to fear from any threat which might have been holden out to him to induce him to make any admission or confession of his guilt; but that whatever he should then say might be given in evidence upon his trial, notwithstanding such promise or threat.'

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"I admitted the declaration, and reserved the point for the Judges. The prisoner was found guilty, and sentence was passed upon him."

"COPY OF THE DEPOSITIONS ANNEXED.

"Nottinghamshire to wit. John Sansome stands charged before the undersigned, one of Her Majesty's Justices of the Peace in and for the County of Nottingham, this 12th day of May, in the year of our Lord 1849, for that he, the said John Sansome, on the 19th of April last, at the parish of Ashfield, in the said County, unlawfully and feloniously used an instrument to the person of one Elizabeth Bailey, she then and there being with child, with intent then and there to procure the miscarriage of the said Elizabeth Bailey; and the said charge being read to the said John Sansome, and the witnesses for the prosecution, Richard Soulding, Mary Ann Ascroft, Lucy Bailey, John Simon Turner, William Picken, and David Richardson, being severally examined in his presence, the said John Sansome is now addressed by me as follows:—'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything, unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial?' Whereupon the said John Sansome saith as follows:—'As regards the charge of in-

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roducing any instrument, upon examination I found it was impracticable on account of the narrowness of the passages, and the apex of the womb lying up so high that I could not reach to feel it ; in consequence of that I withdrew my finger, and observed ‘ You will be all right now.’

“ (Signed) JOHN SANSOME.

“ The above examination was taken before me at Mansfield, in the said county, on the day and year first mentioned.

“ (Signed) JOHN SALMOND.”

Mellor, for the prisoner, after stating the case, said that before proceeding to the language of the Act of Parliament he would refer to the state of the law before this statute. Any confession made under the impression of hope or fear was rejected, upon the ground that the party under such circumstances might say something that was prejudicial to himself. It was always decided, that when the prisoner was brought before the magistrate and was duly cautioned, the evidence was admissible ; but there was much difference of opinion as to what constituted a proper caution. In *Rex v. Smith (a)*, the prisoner was particularly cautioned by the magistrate, but it appeared that a constable had previously, by an inducement held out by him, obtained a confession, and *Littledale, J.*, refused to allow the statement to be put in evidence, thinking the caution insufficient to obviate the effect of the inducement. In *Rex v. Sexton (b)*, the prisoner had made two statements : the first was obtained after giving him some gin ; the second before the committing magistrate, who told the prisoner that the offence affected his life, and a confession might do him harm ; upon which he said, “ It is all true ; ”

(a) 2 Russ. 833 ; and see note (i), *ib.*

(b) 1 Burn’s Just. (by Doyley & Williams) 1086 ; 2 Russ. on Crimes, 833. (See 2 Stark. on Ev. 39, note (s).)

and *Best*, J., rejected the evidence, In *Rosier's case* (a), the prisoner had been told by a constable that he might do himself good by confessing: he afterwards asked the magistrate if it would be any benefit to him to confess, when he was told by the magistrate that he could not say that it would; and the prisoner then declined confessing: afterwards, on his way to prison, he confessed to another constable, and in prison he again confessed to another magistrate, and the Judges were unanimous in holding that the confessions were admissible in evidence, on the ground that the magistrate's answer was sufficient to efface any expectation which the constable might have raised. He stated these cases as showing that, before the statute, it was necessary to be acquainted with any previous statement made to the prisoner, in order to ascertain whether the subsequent statement of the prisoner was admissible, and the consequence was that where inducements or threats had been held out, the prisoners were frequently prevented by the magistrates from making any statement at all. In *Reg. v. Arnold* (b), Lord *Denman*, C. J., in alluding to the custom of warning prisoners, said, "The frequent warnings given to prisoners not to say anything that may criminate themselves render it necessary for me to set right a prevalent error on this subject, and to state what I conceive to be the proper course of proceeding. A prisoner is not to be entrapped into making any statement, but when a prisoner is willing to make a statement it is the duty of magistrates to receive it; but magistrates before they do so ought entirely to get rid of any impression that may have before been on the prisoner's mind, that the statement may be used for his own benefit, and the prisoner ought also to be told that what he thinks fit to say will be taken down and may be used against him on his trial." Upon

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(a) 1 Phil. on Ev. 9th ed. 410; 8th ed. 431.

(b) 8 C. & P. 622.

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reference to the section of the statute in question, it would be found to import that which Lord *Denman* has laid down as a general rule ; and, in *Rex v. Green (a)*, *Gurney*, B., stated in substance the same course as the correct mode of proceeding. By the statute 7 Geo. IV. c. 64, s. 2, it was made the duty of the magistrate to take the examination, and having done so to return it to the Court ; and although a difference of opinion prevailed as to the manner of proof, it was ultimately thought that it was sufficient, *primâ facie*, to prove the signature of the magistrate ; and that in order to exclude the evidence upon such proof it was necessary for the other side to show that something had occurred to render the statement inadmissible. We then have the statute 11 & 12 Vict. c. 42, the object of which was to prescribe a particular caution applicable to all cases, and if such caution was given, to admit the statement in any case whatever, and to prevent the recurrence of those questions which previously arose. This appeared from the preamble to the statute : “ Whereas it would conduce much to the improvement of the administration of criminal justice within England and Wales if the several statutes and parts of statutes relating to the duties of Her Majesty’s justices of the peace therein, with respect to persons charged with indictable offences were consolidated, with such additions and alterations as may be deemed necessary, and that such duties should be clearly defined by positive enactment ;” that being the recital and the object of the statute, he would call attention to the 17th sect. which could not be said to be applicable to *some* cases only ; it was applicable to *all* cases (*b*). That section prescribes the duty of the justice with reference to the examination of the witnesses. Sect. 18, is that

(a) 5 C. & P. 312.

(b) 11 & 12 Vict. c. 42, s. 17. And be it enacted, that in all cases where any person shall appear or be brought before any justice, &c.

upon which this case turns. Before considering that, it is desirable to state that the former statute, 7 Geo. IV. c. 64, is, by s. 34, repealed, so far as it relates to this subject. The only matters therefore to be considered are the common law and the construction of this statute (*a*). Supposing the section to have stopped before the words "provided always," it might have been contended that the depositions alone would have been sufficient evidence of the statement made by the prisoner, without any proof of the signature of the justice, and that this was the intention of the legislature in passing the Act; but coupling that with the proviso, which is part of the same section, it appears evidently intended, that *always* before the accused shall make any statement, the justice shall give him clearly to understand that he has nothing to hope or to fear from any promise or threat held out to him. Is the effect of the proviso to withdraw from the preceding clause something or other, or to limit it, or to give a condition precedent, or does it add something to the duty of the justices? The Act was intended to operate as a protection to the prisoner against any inducement whatever, which might by any person have been held out to him. It was intended that in no case should the justices take the statement without this form. He could not conceive language more calculated to make this a condition precedent. The statute appeared to be based upon that principle; whereas, before the statute, in order to admit the statement, it was necessary to warn the prisoner before he said anything in cases only where there had been a previous inducement held out to him; and as that fact was not always ascertained, in order that no question might arise upon which the evidence might be excluded, the statute required this caution to be given in *all* cases, so that afterwards the statement might be given in evidence whether any inducement had been held out or

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(*a*) 11 & 12 Vict. c. 42, s. 18.

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not. What is the proviso for? Is it to be contended that if the magistrate does not perform his duty the evidence is nevertheless to be received against the prisoner, throwing the onus of proof upon him? The object was not merely to facilitate proof but to define the duties of the justices, and by positive enactment to prescribe the exact form of caution that should be used. Then we have the next proviso (*a*), which means, that as the legislature were then defining the duties of justices, they left the law of evidence as it stood before, and for this there was great reason. [*Alderson, B.*—The words are “at any time,” not at any other time, embracing the time when before the magistrate and when he signs the declaration. Lord *Campbell, C. J.*—Your argument is that the statute was intended to benefit the prisoner, whereas it was, in fact, to facilitate justice.] He contended that it was for the advancement of justice: it was in order that the admission should be received as evidence, notwithstanding a previous inducement; whereas, under the old law, it was too frequently the case that the prisoner escaped by reason of questions arising as to the admissibility of the evidence. It is much more consistent with the genius of our law that the prisoner should be admonished, in order that he should not, when oppressed by the calamity of his situation, be induced by a feeling of hope or fear to state something that is not true, and which might operate to his prejudice (*b*). [Lord *Campbell, C. J.*—Here is a declaration signed by the prisoner. Why is not that admissible?] Because it purports to be taken under the statute, and is not. It was always the duty of the magistrate to propose to the prisoner that he should sign. [*Alderson, B.*—Upon the face of it, it does not appear to have been under the statute. *Erle, J.*—The transmission to the Judge is the condition pre-

(*a*) 11 & 12 Vict. c. 42, s. 18; see p. 248.

(*b*) See Phil. on Ev. 423.

cedent to its admission by him.] He argued upon the supposition that before the signature was taken the admission might have been given in evidence. [*Parke*, B.—The question really is,—Is this a condition precedent?] He contended that it was so. Before the statute it was optional; but now, it was a condition precedent to the admission of the statement in evidence, that such caution should have been given. There are only two cases to be met with upon the subject; the one *Reg. v. Kimber (a)*, where Coleridge, J., after consulting with Cresswell, J., said that they were both inclined to think that the proviso was a condition precedent; and that, in the *absence of any proof* that it had been acted upon, the statement was not receivable in evidence. The present was a stronger case, because it did here appear that the caution had not been given. The other case was *Reg. v. Steele (b)*, before Erle, J. That case also was consistent with his argument. [*Erle*, J.—It was understood to be a direct decision against it.] That a condition precedent may be by proviso, and that this is such a condition, would appear from the case of *The Mayor, Aldermen, and Burgesses of Salford v. Ackers (c)*; that was a decision upon the 11 Geo. IV. c. viii. ss. 82, 83 (a Paving Act). The 82nd sect. gives power to certain commissioners to do certain acts; the 83rd sect. provides “that, *before* they shall” do so, they shall give notice, &c.; and the question there was, whether the giving notice was a condition precedent: and Rolfe, B., in giving the judgment of the Court, after referring to the operation of the two sections, said, “This clearly makes the giving the notice a condition precedent, without a compliance with which, no right of action can arise.” The language of the proviso in that

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(a) Cox, Crim. Law Ca. 223.

(b) Just. of Peace, 606. (Sept. 22, 1849.)

(c) 16 M. & W. 85; S. C., 16 L. J. 6, Ex.

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case is precisely the same as in the present. There it is "provided that *before* the said commissioners shall," &c.; here, "provided the justices, *before* such accused person shall make any statement, shall state to him," &c. It is very difficult to draw any distinction between these two cases. He would observe, in conclusion, that if his argument was incorrect, the statute would still leave open all that inconvenience which it was the object of the Legislature to put an end to. The statute enjoins the duty in *all cases*, because it was intended in *all cases* to get rid of those questions of admissibility, which in too many cases defeated the operation of Criminal Justice.

Denison, for the prosecution, was not called upon.

LORD CAMPBELL, C. J.—We are all of opinion that the objection is unfounded. I reserved the point, not from any doubt I entertained, but because the point was important, and doubts had been raised which it was desirable should be settled. In this case not only is the signature of the magistrate proved, but also the signature of the prisoner, he having heard the whole statement read over. The statement was therefore admissible at common law, unless there is something in the statute to render it inadmissible. [His Lordship referred to the section of the statute (a).] Here there was no evidence of any promise or threat, and therefore there was no necessity for showing that any caution in reference to such matter was given to the prisoner. We are of opinion that giving that caution is not a condition precedent, and that the statute, in reference to that point, is merely directory. If the magistrate does neglect his duty, there is nothing to show that the evidence is not admissible. Looking to the schedule, I find the form

(a) See p. 248, note.

such as is here adopted (a). Whether the first caution provided by the statute, and inserted in the schedule, may be a condition precedent, it is not necessary now to decide; the second clearly is not.

PARKE and ALDERSON, BB., CRESSWELL and ERLE, JJ., concurred.

Conviction affirmed.

(a) 11 & 12 Vict. c. 42, schedule (N).

Statement of the Accused.

: A. B. stands charged before the undersigned, [one] of her majesty's justices of the peace in and for the [county] aforesaid, this day of the year of our Lord for that he the said A. B. on at [&c., as in the caption of the depositions]; and the said charge being read to the said A. B., and the witnesses for the prosecution, C. D. and E. F., being severally examined in his presence, the said A. B. is now addressed by me as follows:—
“ Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;” whereupon the said A. B. saith as follows:—
[Here state whatever the prisoner may say, and in his very words as nearly as possible. Get him to sign it if he will.]

Taken before me, at the day and year first above mentioned.

A. B.
J. S.

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THE QUEEN *against* JOHN THOMAS SIMPSON JONES.

1850.

Saturday,
April 27 (a).

FALSE PRETENCES—VENUE.

Obtaining a gift of money by means of false statements, is obtaining money by false pretences within the meaning of the statute 7 & 8 Geo. IV. c. 29, s. 53.

The prisoner obtained money by false pretences; it was forwarded by post as requested by him. Held, that he constituted the post-master, where the letter was posted, his agent for the receipt of the money, and was therefore properly indicted in the county in which such post-office was situated.

“JOHN THOMAS SIMPSON JONES was indicted (*b*) for obtaining by false pretences a post-office order for the payment of 3*l.*, of the goods and chattels of John Collingridge, with intent to cheat and defraud him of the same; and, in other counts, for obtaining a 5*l.* bank note, and two pieces of paper, to wit, two halves of a 5*l.* bank note of the value of 1*s.*, of the goods, chattels, and moneys of the said John Collingridge, with intent to cheat and defraud him thereof.

“It was proved in evidence that the prosecutor resided at Sunbury in Middlesex, having a house also in Bath; but that at the time of his receiving the letter hereinafter first mentioned he was at his house at Sunbury, and the prisoner at Vauxhall Road in the same county; and with respect to the first charge that the prisoner wrote at his residence the letter of which the following is a copy, with intent to defraud the prosecutor, and assuming a name to which he had no right, viz. that of Dr. Scott, subscribed to the letter:—

“ ‘ Gravesend, July 30th, 1849. Sir,—Permit me to address you in a case of charity, at the earnest entreaty of James Brewer, a young man whom you have been very kind to upon several occasions, and some months ago you

(*a*) This case came before this Court on Friday, Feb. 1, (the first day after Hilary Term last,—present, Wilde, C. J.; Alderson, B.; Maule, J.; Wightman, J.; and Williams, J.) ;—but being incomplete, inasmuch as it did not state where the letter was received by the prosecutor, the Court directed that the case should be sent back to be amended. Alderson, B., then observed that the case properly belonged to the next rota, as it had arisen since the Court began to sit.

(*b*) At the Clerkenwell Sessions.

gave him 1*l.* 3*s.* to take him to Leamington; he was ordered here for the benefit of sea-bathing, but the air being too keen for his delicate frame he has been advised to endeavour to gain admission to the Consumption Hospital, Brompton, near London; he is in very distressed circumstances, and has no means of paying the fees of that institution, and is also indebted here to his landlady for board, &c. Your kindness to him before induces him to hope that you might once more, and for the last time, render him some little assistance to enable him to make up fifty shillings, all that he is deficient of; I have taken more than usual interest in his case, having given him some linen, and 1*l.* 10*s.* in cash, which is as much as my limited means will admit me to do. The sad intelligence of a death in my family obliges me to leave home in a few hours for Scotland, and will be absent some weeks, therefore you will be pleased to return an answer to the poor youth himself, along with the enclosure, which is of importance to him, addressed, James Brewer, Post Office, Gravesend, Kent, to be left till called for; and I have instructed Miss Scott (my sister) to acknowledge the receipt for him. Trusting the motive which actuates me complying with the request will be deemed an apology.

“ ‘I am, Sir,

“ ‘Your obedient servant,

“ ‘JOHN H. SCOTT, M.D.

“ ‘To John Collingridge, Esq., Bath.’

and delivered the same to an accomplice at his residence in Middlesex, with instructions to put it in the post-office at Gravesend, to be there posted; that the same was posted accordingly and duly received by the prosecutor in Middlesex, it having been forwarded from Bath, in the county of Somerset, to him at Sunbury, and he thereupon believing the said story told in the letter to be true, and that it had

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been written by a Doctor Scott, obtained a post-office order at Sunbury for the sum of 3*l.*, as laid in the indictment, in favour of James Brewer, and having enclosed the same in a sealed envelope addressed James Brewer, Post Office, Gravesend, Kent, put it into the Sunbury post-office, where it was transmitted by course of post to Gravesend in the county of Kent, and there received by the accomplice (under the prisoner's instructions), who got the money for the order and gave half the proceeds to the prisoner at his residence in Vauxhall Road, keeping the other half himself. The pretences were each and every of them false, to the prisoner's knowledge, and the letter was written with intent to cheat and defraud the prosecutor, and obtain money from him, and the name of Scott was assumed for that purpose.

“ With respect to the second charge ; it was proved that the prisoner wrote and posted the following letter from Bath :—

“ ‘ Bath, August 6th, 1849. Sir,—It is a most unusual thing for me to address an individual to whom I am an entire stranger, but circumstances over which I have no control almost compel me to make my present situation known, and having received this morning a note from Dr. Harrison, who was an early friend of my late father the Rev. W. C. Collingridge of Newcastle, intimating that a namesake of mine was residing at Bath, and under an impression, (as our name is by no means common,) I have ventured to address you, thinking you might spring from the Northumberland family of the Collingridges. I know of no relations in the world living bearing my name, excepting an only brother now living in Hexham, and several sisters married, who, of course, do not take the same now. I have been bred to mercantile pursuits of commerce, and for many years resided at Cape St. Mary's, River Gambia.

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western coast of Africa, when I lost in one night, by the upsetting of a shallop or small-decked vessel, at the mouth of the river Nuno, the entire savings of many years of industrious but laborious toil, amounting to 2750*l.* in one of the most unhealthy climates in the world; and, what is worse than the mere loss of wealth, the burning heat of the torrid zone has so injured my constitution, that, at the early age of 34, I have been compelled to relinquish a good situation which required some activity. Since my return to England, I have for some time past been endeavouring to obtain a situation in some of the milder West India Islands, Madeira, or the south of Europe, with a view of establishing my health; but all endeavours have proved unavailing. The medical profession have recommended me to try the benefit of the Bath waters, but I am sorry to say I have found no benefit; my funds are almost, nay, I may say wholly expended, and I have not one single friend here to whom I may appeal to in confidence. Upon beginning to write this it was my intention to have asked you to advance me a small sum as a loan, that is if you had any knowledge of our family in the north; but I will refrain from asking that favour, for if you oblige me with a loan I have no prospect in the world of repaying at present, and if it is in your power to assist a ruined merchant in ill health I will feel truly grateful: it must be as a gift, for from the tenor of my brother's letter it appears his means are limited, and I have no prospect there except casual assistance. Read his letter, and you will see his position and mine: he sent me 5*l.* in June, and having an aged mother to maintain, and a large family, upon his small practice (being by profession a surgeon), I really cannot summon resolution to apply to him, at least for a time. The enclosed letter you will be pleased to return to me, as also which you will perceive is signed by the Archbishop of York, (signed Ebor,) I presume the Latin name for that city, and as I am invited to

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spend a day with a family in Chippenham, some twelve miles distant, you will be pleased to return them to me there, addressed as below.

“ ‘I am a poor one, Mr. Collingridge, to press for a favour ; I have always through life been placed above it, and my distresses are not the less, or the privations which I have undergone, and now silently undergoing, are not the less keen, because I do not enlarge upon them ; but, as I have addressed you in confidence, I will here state that if you can render me any pecuniary assistance, without injury to those who may have strong claims upon you, and equally necessitous, I will be for ever grateful for the least aid. An early answer will oblige. And I may here mention, it was your domestic in Pulteney Street who gave me your address, having called this morning in the hope of seeing you personally, wishing you, sir, a long enjoyment of peace and tranquillity,

“ ‘I remain, Sir,

“ ‘Your obedient servant,

“ ‘JOHN HENRY COLLINGRIDGE.

“ ‘Address Mr. J. H. Collingridge, (to be called for,) late from Africa, the Post Office, Chippenham, Wilts. To John Collingridge, Esq., (of Bath,) Sunbury Villa, Sunbury, Middlesex. J. H. C.’

“ That it was received at Sunbury by the prosecutor, who thereupon believing its contents to be true, and that it was written by a person bearing the name of J. H. Collingridge, enclosed one half of a 5*l.* note in a letter addressed ‘ Mr. J. H. Collingridge, (to be called for,) late from Africa, Post Office, Chippenham, Wilts,’ and forwarded it by post from Sunbury to Chippenham in the county of Wilts, where it was received by the prisoner, who thereupon requested the prosecutor by letter to forward the second half of the note by post to his residence in Middlesex, and

which the prosecutor, who was then still at Sunbury and wrote from thence, accordingly did, and the prisoner received it there, and by letter duly acknowledged the receipt of such half-note there. The letter was written by the prisoner himself with intent to defraud the prosecutor of his money, and he knew the contents to be false, assuming for the purpose of such fraud the name of John Henry Collingridge, to which he was not and never had been entitled.

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“ Three points were taken by the prisoner’s Counsel as to both charges.

“ I. That neither of them were offences within the meaning of the statute; that the post-office order and the 5*l.* note were mere voluntary gifts; and that the statute did not apply to mere voluntary gifts.

“ II. As to the first charge—that the same, if triable anywhere, was only triable in the county in which the post-office order was received, and that it was received in the county of Kent.

“ III. As to the second charge—that one half of the bank note having been received in Wiltshire and the other half in Middlesex, the bank note was not received in Middlesex; and that with respect to the charge of obtaining two pieces of paper, to wit, two halves of a Bank of England note, value 1*s.*, the same constituted no offence, because the halves were of themselves and as distinct from each other valueless.

“ The jury found the prisoner guilty.

“ JOHN ADAMS,

“ *Jan. 25th*, 1850.

Assistant Judge.”

No Counsel appeared for the prisoner.

Phinn, for the prosecution.—As to the objection, that this was not an offence within the statute, it was remarkable that the first statute upon this subject almost directly

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met this case. The stat. 33 Hen. VIII. c. 1, is an Act “against them that counterfeit letters or privy tokens to receive money or goods in other men’s names.” This is a counterfeit letter in another man’s name. The next statute is 30 Geo. II. c. 24, s. 1; and then we have the stat. 7 & 8 Geo. IV. c. 29, s. 53, which repeats the very words used in the stat. 30 Geo. II. Upon the construction to be put upon those statutes, he would submit that any false pretence of any existing fact made with an intent to deceive was an offence within the statute. He then referred to the judgment of Lord Kenyon, C. J., in *Young v. The King* (a), *Rex v. Villeneuve* (b). There was also the case of *Rex v. Crossley* (c). [Cresswell, J.—The real

(a) 3 T. R. 102. Lord Kenyon observed, that, “when the 30 Geo. II. c. 24, was passed, it was considered to extend to every case where a party had obtained money by falsely pretending, himself, to be in a situation in which he was not; or any occurrence that had not happened, to which persons of ordinary caution might give credit. The statute 33 Hen. VIII. c. 1, requires a false seal or token to be used, in order to bring the person imposed upon into the confidence of the other; but that being found to be insufficient, the statute 30 Geo. II. c. 24, introduced another offence, describing it in terms extremely general. It seems difficult to draw the line and to say to what cases this statute shall extend, and therefore we must see whether each particular case as it arises comes within it.” His Lordship then adverted to the facts of that case;—that four men went to the prosecutor, representing certain circumstances as about to take place; that one William Lewis should go a certain distance within a limited time; that they had betted upon the event, and should probably win; that the prosecutor was, perhaps, too credulous and gave confidence to them, and advanced his money; and afterwards the whole story proved to be an absolute fiction. His Lordship then went on to observe—“Then the defendants, morally speaking, have been guilty of an offence. I admit that there are certain irregularities which are not the subjects of criminal law; but when the criminal law happens to be auxiliary to the law of morality, I do not feel any inclination to explain it away. Now this offence is within the words of the Act; for the defendants have, by false pretences, fraudulently contrived to obtain money from the prosecutor, and I see no reason why it should not be held to be within the meaning of the statute.”

(b) Cited by Buller, J., in *Young v. The King*, 3 T. R. 104.

(c) 2 M. & R. 17. That was an indictment under the stat. 7 & 8 Geo. IV. c. 29, s. 53, and Patteson, J., there said, “The words of this act are very general, and I do not think I can withdraw the case from the jury. If they are satisfied that the prisoner fraudulently obtained the 300*l.* from the prosecutor

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question arising there was whether the money was obtained from a supposed existing fact, or from the promise to pay it.] It had occurred to him, it might be said, that inasmuch as the stat. 5 Geo. IV. c. 83, s. 4 (a), had made this a substantive offence, by enacting that "every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence," should be deemed a rogue and vagabond, and punished as directed in sect. 3 of that statute, the prisoner should have been proceeded against in conformity with that section; but then it might be argued that endeavouring to procure was not procuring. Lord Coke (b) cites the case of a person who had induced another to maim him that he might have the more colour to beg, and both of them were indicted and fined. There was also another case much akin to the present, in which this objection was not taken

by a deliberate falsehood, averring that he had all the funds required to take up the bill except 300*l.*, when in fact he knew that he had not, and meaning all the time to apply the 300*l.* to his own purposes, and not to take up the bill, it appears to me that the jury ought to convict the prisoner." * * * *
 "Then as to the money being advanced by the prosecutor only as a loan; the terms of the Act of Parliament embrace every mode of obtaining money by false pretences, by loan as well as by transfer. If the Legislature meant to use the term in a more limited sense, it is to be regretted that they have not used language which can fairly have that effect."

Villeneuve's case, cited by Buller, J., in *Young v. The King*, 3 T. R. 104, was the case of a loan.

(a) The Vagrants' Act.

(b) 1 Inst. 127 b. Lord Coke cited that case, after observing that "the life and members of every subject are under the safeguard and protection of the king; for, as Bracton (lib. i. fol. 6) saith, *Vita et membra sunt in potestate regis*. And therewith agreeth a notable record, *Pasch.* 19, Ed. 1, *coram Rege*, Rot. 36, *Northt.*: *Vita et membra sunt in manu regis*, to the end that they may serve the king and their countrie when occasion shall be offered. Nay, the lord of the villeine, for the cause aforesaid, cannot mayheme the villeine, but the king shall punish him for mayheming of his subject, (for that hereby he hath disabled him to do the king service,) by fine, ransome, and imprisonment, until the fine and ransome be paid."

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—the case of Joseph Ady (*a*). [*Lord Campbell*, C. J.—We have no doubt this is obtaining money by false pretences within the meaning of the statute.]

Then as to the next point—the venue. [*Alderson*, B.—By putting the letter in the post the post-master is the agent for the purpose of receiving.] That was what he intended to contend. [*Lord Campbell*, C. J.—Was it not a receiving in Middlesex when the post-master there received it for him?] All that he had to suggest was the case of *Rex v. Buttery* (*b*), and that the statute 7 Geo. IV. c. 64, s. 12 (*c*), exactly met this case. The same observations applied to the third objection.

ALDERSON, B.—This would have done under the old law, prior to 7 Geo. IV. c. 64, s. 12; in fact it would have done either way (*d*).

Judgment for the Crown.

(*a*) 7 C. & P. 140.

(*b*) Cited by Abbott, C. J., in *Rex v. Burdett*, 4 B. & Al. 179; and in *Pearson v. M'Gowran*, 3 B. & C. 703.

(*c*) 7 Geo. IV. c. 64, s. 12. “And for the more effectual prosecution of offences committed near the boundaries of counties, or partly in one county and partly in another; be it enacted, That where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of 500 yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any of the said counties in the same manner as if it had been actually and wholly committed therein.”

(*d*) His Lordship observed this was a great evil which ought to be severely punished. Had it been tried before him, he did not know that he should not have transported the prisoner.

THE QUEEN *against* WILLIAM WOOLLEY.*Case reserved by the Honourable Justice Patteson.*

FALSE PRETENCES.

1850.

*Saturday,
April 27.*

“THE prisoner was tried and convicted before me at the last Assizes at Stafford, on an indictment which charged, in

“The 1st count, That he was secretary to the Earl of Uxbridge Lodge of Odd Fellows at Burton-upon-Trent. That Joseph Buxton was a member, and indebted thereto in 2s. 2d. That defendant falsely pretended to Buxton that the sum of 13s. 9d. was due from him to the Lodge, and thereby obtained from him one sovereign, one half-sovereign, three crowns, four half-crowns, eleven shillings, twenty-three sixpences, one hundred and thirty-nine pence, and two hundred and seventy-eight halfpence of the moneys of Buxton, with intent to cheat and defraud him; and whereas, &c.

“2nd count, Alleged the obtaining of same moneys, omitting the sovereign and half-sovereign.

“3rd count. Falsely pretending to Joseph Buxton, that 13s. 9d. would be due and owing on the 20th November, 1848, from him to a certain society called the Earl of Uxbridge Lodge of Odd Fellows, and obtaining 13s. 9d.

“4th count. Obtaining 13s. 6d.

“5th count. Unlawfully demanding, having, and receiving 13s. 9d.

“It appeared in evidence that Joseph Buxton was a member of the Lodge. That his contribution was 9d. per fortnight. That the prisoner was permanent secretary of the Lodge with a salary. That it was his duty to receive

A secretary of a friendly society obtaining money from one of the members under pretence that it was owing, when in fact no money was owing, is guilty of a “false pretence” within the meaning of the statute 7 & 8 Geo. IV. c. 29, s. 53.

It is not the less a false pretence within the statute, because the party imposed upon might by common prudence have avoided the imposition (a).

(a) Overruling the doctrine laid down by Wilmot, J., in *Rex v. Wheatley*, 2 Burr. 1129.

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money from the members in Lodge hours, but he had no authority to receive any out of the Lodge. That, on the 17th November, prisoner himself brought and tendered to Buxton out of the Lodge a writing or summons in the words following.

“ ‘ Earl of Uxbridge Lodge,

“ ‘ Burton on Trent, November, 14th, 1848.

“ ‘ Sir and Br. (Brother).

“ ‘ I hereby give you notice, that you owe to your Lodge, for contributions, &c. the sum of 13s. 9d. due on the 20th inst.

“ ‘ Yours respectfully,

“ ‘ WILLIAM WOOLLEY.

“ ‘ To Mr. Joseph Buxton.’

“ The 20th November was the next Lodge night after the 14th. Prisoner said, ‘ I have brought you a summons for the money you owe the Lodge.’ Buxton opened the paper, and said, ‘ Do I owe that amount 13s. 9d.?’ Prisoner said ‘ You do.’ Buxton said ‘ It is not long since I paid a sum at the Lodge to you.’ Prisoner said ‘ That is what you owe. Buxton said, ‘ Very well;’ and paid him 14s. and received 3d. in change. But Buxton could not recollect in what coin he paid, except that there were half-crowns. Buxton had never paid money out of the Lodge before ; he never paid any more, nor went to the Lodge afterwards. Prisoner wrote on the paper,

“ ‘ November 17th, 1848. Received 13s. 9d. on this account.

“ ‘ WILLIAM WOOLLEY.’

“ It appeared by the books of the Lodge, in prisoner’s writing, that Buxton had paid 3s. 9d. on the 23rd October, at the Lodge ; and that, on the 29th November, two sums of 9d. and a subscription of 8d. were due from him. The

prisoner accounted to the Treasurer on the 20th November, and paid him 4*l.* 11*s.* 1*d.*; but no sum of 13*s.* 9*d.* from Buxton. There was no entry on the 20th November, of any fine inflicted on Buxton. But there was an entry, in prisoner's writing, of a fine of 1*s.* on him on the 4th of December. Fines are entered at the time they are inflicted. On the 22nd October, 1849, there is an entry against Buxton's name, 1*l.* 1*s.* 10*d.*; expelled.

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“ Mr. *Vaughan*, for the prisoner, objected,

“ 1st. That there was no false pretence within the stat. 7 & 8 Geo. IV. c. 29, s. 53. That the fact of what was due was as much within the knowledge of Buxton as of the prisoner. That it was no more a false pretence than if a creditor should say, ‘ You owe me 5*l.*,’ when the debt was only 2*l.*, and so obtain 5*l.*

“ See 2 East, P. C. 830, *R. v. Withell*; 2 Moo. 254, *R. v. Johnston*; C. & M. 249, *R. v. Ball*; 7 C. & P. 848, *R. v. Reed*.

“ 2nd. That if there be any false pretence, it is the paper or summons, which therefore ought to be set forth in the indictment.

“ See Starkie on Crim. Pleading, p. 97.

“ On the other side, it was contended that the false pretence was the oral assertion of the prisoner, who himself brought the paper, signed by himself, that the money was due.

“ See 16 L. J., Mag. Cas. P. 7, *Hamilton v. Reg.* in error.

“ I request the opinion of the Court, whether this conviction can be sustained upon all or any of the counts of the indictment.

“ J. PATTESON.”

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“THE same prisoner was also convicted on an indictment charging him with obtaining a sovereign from William Buxton by false pretences, with intent to defraud him. The indictment was in a similar form to the preceding one. William Buxton was member of the Lodge, and contributed 9*d.* per fortnight. He had been residing at Manchester, and paid through his mother, who resided at Burton-upon-Trent. It appeared, by the prisoner’s books, that payment of 1*s.* 6*d.* was made, on account of William Buxton, on the 23rd April, 1849, so that 3*s.* would be due on the 18th June; and there is an entry by the prisoner of payment by Buxton of 3*s.* on the 18th June; on the 15th June, Buxton returned to Burton; and on the 18th went to the Lodge, being a Lodge night. When he was outside the door he saw the prisoner inside, who told him he could not be admitted till he was clear. Buxton asked what was due. The prisoner said 13*s.* 5*d.* Buxton gave him a sovereign, and was then admitted. The prisoner went to his desk, and entered 13*s.* 5*d.* on Buxton’s card, but paid over to the treasurer 3*s.* only, as received from Buxton, which was the sum really due.

“The same objections were made also in this case, so far as they were applicable.

“J. PATTESON.”

Vaughan, for the prisoner, contended that that which was stated as a false pretence was not a false pretence in law. All the cases that have been decided upon this subject may be classed under one of three heads:—a false representation as to the condition in life of the party; of some act done; or, of a statement made by a third person. Under the first head were *Rex v. Barnard* (a) and *Hamilton v. The Queen* (b). *Rex v. Douglass* (c), *Reg. v. Wick-*

(a) 7 C. & P. 784.

(b) 16 L. J. 9, M. C.

(c) 1 Camp. 212.

ham (a), and *Young v. The King* (b), may be classed under the second head. And then we have those cases in which the name of a third person has been introduced, as in *Colman's Case* (c), *Rex v. Freeth* (d). These were the cases which illustrated the divisions of false representations which he had submitted to the Court; and in all these cases the money or the goods had been obtained by means of a representation, the falsity of which could not be known by the party to whom the representation was made; nor had the party any immediate means of ascertaining whether the representation was true or false; but no case was to be found where a representation like the present, though false, was held to be a false pretence within the meaning of the statute (e). [*Lord Campbell, C. J.*—What is your definition of a false pretence which would exclude this? Is it the statement of a fact, the truth or falsehood of which cannot be known to the party at the time?] Yes; but where it is of a matter, of which the party to whom the representation is made, has the means of knowledge as well, and as fully, as the party making the representation, it is not within the meaning of a “false pretence.” [*Alderson, B.*—Was not that a false pretence which induced the party to part with his money of which the prisoner obtained possession?] In that case it would include every lie by which money might be obtained. [*Alderson, B.*—What is it but a lie where a man says he is sent by Mrs. Thompson for a pair of shoes?] The distinction is, that there the party could not know that it was false. [*Lord Campbell, C. J.*—Could he not send to Mrs. Thompson?] She might live five miles off. [*Alderson, B.*—Or she might live next door; it cannot be a question of distance. *Parke, B.*—The ques-

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(a) 10 Ad. & E. 34.

(b) 3 T. R. 98.

(c) 1 Leach, 303, *notis*, 2 East, P. C. 672.

(d) R. & R. 127.

(e) 7 & 8 Geo. IV. c. 29, s. 53.

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tion is well discussed by Mr. Greaves (a).] That was in reference to a case where the representation was that the prisoner was in the East India Company's Service. [*Parke, B.*—It does not matter what were the facts. It is a question whether a false statement is made by which a party is imposed upon.] In *Rex v. Wheatley* (b), Wilmot, J., said, "the true distinction that ought to be attended to in all cases of this kind, and which will solve them all, is this—that in such impositions or deceits, where common prudence may guard persons against the suffering from them, the offence is not indictable, but the party is left to his civil remedy for the redress of the injury that has been done him; but when false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive as people cannot by any ordinary care or prudence be guarded against, there it is an offence indictable." [*Erle, J.*—That was the law for some time; but now the law is not for the protection of the strong alone, but also for the protection of the weak. *Alderson, B.*—All the difficulty has arisen from engrafting this upon the old law of a false token, which was a much more strict law. *Lord Campbell, C. J.*—Here the prisoner knew there was no money due; the prosecutor might have known it or not.] What difference was there between the present case and that of a man going to a tradesman and telling him that he owed him five pounds, when one pound only was due, or even when he owed him nothing at all? It is a lie, but it does not amount to a false pretence. [*Erle, J.*—Is there not a case (c) of a carrier offering a parcel and demanding a larger sum as due than was actually owing?] In that case the parties had not an equal opportunity of knowing the facts. [*Lord Campbell, C. J.*—In the case you put

(a) 2 Russ. on Crimes, 289, 3rd ed.

(b) 2 Burr. 1129.

(c) *Quære*, see *R. v. Airey*, 2 East, 30; and 2 East, P. C. 830.

of the tradesman, I think, at present, that it would be an offence within the statute.] If that was the opinion of the Court, he would offer no further argument. [*Alderson, B.*, referred to *Rex v. Villeneuve (a).*] *Rex v. Reed (b).*

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Huddleston, with him *M'Mahon*, for the Crown, were not called upon.

LORD CAMPBELL, C. J.—What difference can it make whether the party has to make the inquiry from another person, or to ascertain the fact from his own books. Lord Denman, in *Reg. v. Wickham (c)*, and *Hamilton v. The Queen (d)*, appears to have laid down the law exactly as it ought to be.

Conviction affirmed.

(a) 2 East, P. C. 830. (c) 10 Ad. & E. 34.

(b) 7 C. & P. 848. (d) 16 L. J., M. C., 9; S. C. 10 Jur. 1028.

THE QUEEN *against* SODAICK FADERMAN, SAUL LAURIO, AND
BERNARD GORDON.

1850.

Saturday,
April 27.

Case reserved by the Honourable Justice Vaughan Williams.

DEMURRER.

Where the prisoners have not been tried and convicted, this Court has no authority to hear, nor has the Judge below power to reserve, a case upon the validity of an indictment upon which he has already given judgment, even though the judgment should have been given expressly with a view to reserving the case. Under such circumstances the proper course for the prisoner is to bring a writ of error before the Queen's Bench.

Where judgment is so given against a prisoner, this Court has no power to place him in the same situation that he was in before the demurrer.

Semble, Where (by arrangement) no judgment is, at the trial, given upon the demurrer; the case goes on, and the prisoner is convicted; the point raised upon demurrer may be reserved. (See, however, the Rules of Court, Appendix.)

Semble, The judgment of this Court deprives the party of his writ of error.

“THIS case came to be tried before me at the Central Criminal Court, on the 8th day of February, 1850.

“The prisoners were indicted under the statute 1 Will. IV. c. 66, s. 19, by which it is made a felony to engrave, &c. (without authority) on any plate, or any wood, stone, or other material, any bill of exchange, promissory note, undertaking, or order for the payment of money, or any part of any bill of exchange, &c. of any foreign prince or state; or knowingly to have in possession any plate, &c. so engraved, or to utter or knowingly to have in possession any paper on which any part of such foreign bill, &c. shall be made or printed.

“The counsel for the prisoners demurred to the indictment, and the demurrer having been argued, I gave judgment for the Crown; but I reserved the question as to the validity of the indictment, (a copy of which will accompany this statement,) for the consideration of this Court.

“EDWARD VAUGHAN WILLIAMS.

“April 17, 1850.”

Huddleston, Parry, and Metcalfe appeared, each for a separate prisoner. The case being called on, *Lord Campbell*, C. J. said—We are all of opinion that where judgment is given upon demurrer there is no power to

reserve the case for the opinion of this Court, or for us to hear it; that being so we cannot assume a jurisdiction.

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Huddleston said that no judgment had really been given.

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Cresswell, J.—How can it come before us if judgment has not been given? In either case, whether judgment was given upon the demurrer or not, we have no power.

Parke, B.—It is open to you to argue that this Court has jurisdiction.

Alderson, B.—Our judgment would be final; it would take away the appeal to the House of Lords. It is a grave question, because it might be exercised adversely to the next prisoner.

Parry observed that the judgment upon the demurrer was given as a matter of form, in order to raise the question, and therefore applied that the prisoner *Laurio* might be remitted to the same position he was in before.

Lord Campbell, C. J.—We have no power to do so.

Clarkson, who appeared (together with the *Attorney-General* and *Ballantine*) for the Crown, observed that *Vaughan Williams, J.*, expressed great doubt as to the authority of this Court to hear the case upon demurrer.

Vaughan Williams, J., (here came into court, and) said that all parties at the trial thought that it would be desirable to take the opinion of this Court, and that judgment was given for the Crown with a view to raise the question here.

Attorney-General.—In *Manning's case* (a) the difficulty was got rid of by the judge stating a case by arrangement. In that case there was no judgment given. This point is of great importance, for if the matter was determined here they could not go to another Court.

Lord Campbell, C. J.—The proper course will be to bring a writ of error before the Queen's Bench.

(a) *Supra*, p. 155.

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FADERMAN.

Attorney-General.—He would grant a fiat and then it could go up in the usual form.

Huddleston suggested that counsel should be allowed to address the Court upon the point, whether the Court had jurisdiction to consider the case presented to them; and that afterwards the prisoners should be placed in the same position as if they had not been heard.

Erle, J.—Nothing in a trial for felony can be done by consent.

Parry asked, upon the authority of *Manning's case* (a), that Williams, J., should state a case for the consideration of this Court.

Lord Campbell, C. J.—In that case the demurrer did not appear upon the record.

Parke, B.—Prior to this statute the opinion of the Judges was taken upon matters appearing upon the record (b).

Parry asked that the case might be amended.

Lord Campbell, C. J.—Judgment must be taken as given for the Crown, and the only point we can hear argued is whether we have any authority in a case where judgment has been given upon demurrer.

Huddleston (for the prisoner Faderman) referred to the stat. 11 & 12 Vict. c. 78, s. 1 (c); by that section the judge has power to reserve any question of law which may arise in criminal trials for the consideration of this Court. In Arch. Cr. L. (d), "Under this statute the Judge has authority to reserve, and the Court to entertain, not only questions of law which are raised by the evidence, but also any question of law which arises upon the record and is made the subject of a motion in arrest of judgment, *Reg. v. Martin* (e); or as it should seem of a demurrer; or which

(a) *Supra*, p. 155, note.

(b) And see *Reg. v. Webb*, *supra*, p. 26, per Pollock, C. B.

(c) See Statute, Appendix.

(d) 11th ed. p. 112.

(e) *Supra*, p. 78. It appears that *Reg. v. Martin* had not been reported when this passage was written.

arises on a special plea in bar." In *Reg. v. Martin (a)*, Rolfe, B. observed, "I think the word trial in the second section of the stat. 11 & 12 Vict. c. 78, ought to have a very liberal construction, and I think it applies to any proceedings in the Court below." The words of the statute are "reverse, affirm, or amend *any* judgment which shall have been given on the indictment or inquisition on the trial, whereof such question or questions shall have arisen; or to avoid such judgment, and to order an entry to be made upon the record that in the judgment of the said Justices and Barons the party convicted ought not to have been convicted or to arrest the judgment," "or to make such other order as justice may require." Suppose the Court below to have given a judgment of *respondeat ouster*, that would be within the words of the statute, "or to avoid such judgment." [*Lord Campbell*, C. J.—It appears to me the conviction is a condition precedent in all cases to give jurisdiction to this Court.] The judgment upon a demurrer would be *respondeat ouster*, and it appeared to him this Court would have authority in case of any judgment. [*Alderson*, B.—What discretion has the Judge to raise the question upon demurrer?] Still the object of the statute was to supply a Court of Appeal in all cases. [*Alderson*, B.—You wish the case to be argued here; the next prisoner may not; what right have we to make a precedent by means of which we might take away from him the power to go to a Court of Error. *Lord Campbell*, C. J.—The words "any judgment" mean any judgment which comes properly before us.] He felt the difficulty was in the word "conviction" in the statute, and not in the word "trial." [*Lord Campbell*, C. J.—It must be taken that the word "conviction" means conviction upon trial.] Where judgment is given upon demurrer, there is a con-

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(a) 2 C. & K. 950—956. *S. C.*, supra, p. 78, where the judgment is rather differently reported.

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viction ; on an indictment for a misdemeanor, it is final (a). [Alderson, B.—How could the Judge “postpone the judgment” upon demurrer. He gives judgment. Lord Campbell, C. J.—Everything contemplates a conviction by verdict.] Suppose, upon an indictment, that judgment is given for the Crown ; that the Crown is however dissatisfied with the indictment, and the prisoner is again indicted ; could he not plead the previous trial as a bar ? The word “thereupon” in s. 2, does not mean upon conviction, but upon the case being reserved for the opinion of this Court.

Parry (for the prisoner Laurio).—The object of the statute was to give to this Court to the full extent that power which was before exercised by the fifteen Judges. It is intituled “An Act for the further Amendment of the Administration of the Criminal Law.” [Parke, B.—We do not know whether this was a judgment of conviction or *respondeat ouster* ; in the latter case you have no claim whatever.] If it be a judgment of conviction, sentence might be passed ; and was it to be said that, in such a case,

(a) When the prisoners afterwards (at the May Sessions, 1850) were put upon their trial, before the Central Criminal Court, the point was raised whether the judgment upon demurrer in this case was final. It was a general demurrer—no plea of not guilty. It was argued at considerable length before Alderson, B., Cresswell, J., and Vaughan Williams, J., by the Attorney-General, Clarkson, and Ballantine, on the part of the Crown ; and by Huddleston, Parry, and Metcalfe, for the prisoners. The Court took time to consider, and gave their judgment—that judgment, upon the demurrer, was final.

For the prisoners, on this point, were referred to *Rex v. Harris*, 7 C. & P. 429 ; 2 Chit. C. L. 1040 ; *Mason's Case*, 2 East, P. C. 975 ; *Lyon's Case*, 2 Leach, C. C. 608 ; *Lloyd's Case*, 2 East, P. C. 976 ; *Gilchrist's Case*, 2 East, P. C. 982 ; *Reg. v. Goldstein*, 7 Moor, 1 ; 2 Hales, P. C. 256 & 225 ; *Reg. v. Purchase*, Car. & M. 617 ; *Reg. v. Philips*, Car. & M. 181 ; *Reg. v. Adams*, Car. & M. 299 ; *Gray's Case*, 11 Cl. & Fin. 427 ; *Reg. v. Odgers*, 2 Moo. & R. 479 ; *Reg. v. Bowen*, 1 C. & K. 504 ; *Reg. v. Duffy*, 4 Cox, Cr. Ca. 24.

For the Crown, stat. 2 & 3 Will. IV. c. 123, in connection with 1 Will. IV. c. 66, was referred to, and it was contended that the demurrer was in reality a confession of the fact.

Alderson, B., in giving judgment, referred to 14 Ed. IV. p. 7, pl. 10.

See these proceedings fully reported in 4 Cox, C. C.

this Court had no authority? [*Lord Campbell, C. J.*—You call upon us to reverse the judgment for the Crown.] To avoid or amend that judgment; this Court is not bound to give final judgment. [*Alderson, B.*—The only way to avoid the judgment is to order a verdict of “Not Guilty” to be entered.] It appeared to him the Act might have been passed to avoid a writ of error, which prisoners generally are unable to bear the expenses of. Then as to the question whether the prisoner had been upon his trial; the trial begins when the party is called upon to plead; suppose he had pleaded to the jurisdiction, would it be contended that this Court had no power to entertain the question without a conviction? [*Lord Campbell, C. J.*—We have no power but that which is given by the Act.] He apprehended this Court would give the Act a liberal construction. If it should be held that this Court had authority in no case where there had not been a conviction, then the object of the Act was limited indeed; would they exclude the consideration of a plea in abatement which is a matter upon the trial; the statute does not say conviction *upon trial*. This is ostensibly a statute conferring privileges, the recital would confer a privilege of this sort and no other part of the Act contradicts it; it is a statute intended to give enlarged powers, and this Court would not seek to circumscribe it.

Metcalf, (for the prisoner Gordon,) followed on the same side. The great question is, what is meant by the words “conviction” and “trial.” A prisoner may be said to have been convicted whether upon his own confession or otherwise. If judgment upon demurrer is final it amounts to a conviction; *Reg. v. Toshack* (a) establishes that this Court has jurisdiction when the prisoner has been convicted upon his own confession. He would infer from that case that it is not necessary that the objection should appear at the trial.

(a) *Supra*, p. 207.

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There is a trial upon an issue in law as well as upon an issue in fact. The words of the section appear important, "and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question shall have been considered and decided as he may think fit." [*Lord Campbell, C. J.*—Does not all that contemplate a verdict?] He thought not, because it might be upon the confession of the party. If the judgment is upon demurrer, judgment must be given or there could be no conviction, and that is the judgment which this Court has to affirm or otherwise. The plea of *autrefois convict* would aid the argument, because, this Court would not hold that such a plea could not be put in when the party had been sentenced upon demurrer. As to the writ of error, it appeared to him doubtful whether it would be taken away. [*Alderson, B.*—The question reserved is to be finally decided.] It may be finally decided upon the point of law reserved. This Court is placed in the situation of the judge in the Court below. *Reg. v. Webb (a)*, decided that a writ of error might be brought.

The Attorney-General, Clarkson and Ballantine, for the Crown, were not called upon.

LORD CAMPBELL, C. J.—I maintain the opinion I entertained, that this Court has no jurisdiction in the present case. It is an indictment for felony, a demurrer to the indictment, and thereupon judgment for the Crown. We are called upon to decide upon that judgment, and if wrong to reverse it. Have we the power to do so? All the power we have is under the statute. We have, in this matter, no more power than the fifteen judges had before the statute. But now by that statute a power is given to this Court to review what is done under certain circumstances. We must say whether such a power as is con-

(a) *Supra*, p. 24, per Parke, B. *Quære*, after the judgment of this Court.

tended for is vested in this Court. I find no such power conferred upon us ; the statute refers to questions which shall arise *upon the trial*, and which *after the prisoner shall have been convicted* may be reserved for this Court. Looking at the language employed, the word “*convicted*” must be taken to mean convicted upon verdict : and that really is the trial that takes place before the jury (a). There is no power here given to us to investigate what is done upon demurrer before the trial begins. If we decide that we have the power to entertain this question, what is the consequence ? The prisoner here comes to us to have our opinion. Another prisoner under similar circumstances may wish for a writ of error, of which we might deprive him. I think it an usurpation to entertain the question.

PARKE and ALDERSON, BB., CRESSWELL and ERLE, JJ., concurred.

Per Curiam.—The only judgment given is that
This Court has no jurisdiction.

(a) See *Reg. v. Martin, supra*, p. 86, per Rolfe, B.

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THE QUEEN *against* JAMES THOMPSON.

1850.

Saturday,
April 27.

LARCENY.

The prisoner went away with the wife of the prosecutor, and took with him a box of his own in which he had assisted in placing property of the husband. He subsequently cohabited with the wife, used some of the property, and pledged a portion, consisting of her wearing apparel, and appropriated the proceeds to his own use. Held that he was properly convicted of larceny.

“JAMES THOMPSON was indicted at the Quarter Sessions for the county of Lancaster, held at Salford on the 17th of January, 1850, and was found guilty of stealing nine gowns, two brass candlesticks, one coffee-pot, one dining-table, two aprons, two pairs of boots, two pairs of shoes, four shawls, two pairs of stockings, two sheets, and two silk handkerchiefs, the property of Thomas Edgerton. The evidence showed that the prisoner, who worked and lodged at the prosecutor's house, went away on the 4th January, 1848, with the prosecutor's wife; that they went to Birmingham, where they lived together as man and wife for more than a year; that they took with them from the prosecutor's house a box belonging to the prisoner containing the wife's wearing apparel, and also a coffee-pot and two candlesticks, the property of the prosecutor. The wife of the prosecutor was examined, and gave very contradictory evidence as to what passed at the time of leaving the prosecutor's house. She stated however, as part of her evidence, that the prisoner assisted in placing the things in the box, and in removing the box from the cellar to the cart in which it was taken away. It appeared further, that on the parties arriving at Birmingham, the box was opened and the prisoner saw its contents; that the coffee-pot and candlesticks were used by them in their house in Birmingham, and that these articles were afterwards sold by the prosecutor's wife; that the prisoner then pledged some articles of the wearing apparel, and applied the money for his own purposes. The chairman, in summing up, directed the jury to find the prisoner guilty, if they came to the one,

or the other, of the following conclusions,—either, first, that the prisoner going away with the prosecutor's wife for the purpose of adulterous intercourse was engaged jointly with her in taking the goods ; or, secondly, that not being a party to the original taking or removal, the prisoner after arriving at Birmingham appropriated any part of the goods to his own use. The jury found the prisoner guilty, adding, that they did so on the ground that there was a joint taking by the prisoner and the prosecutor's wife. The counsel for the prisoner applied to the Court to reserve the question, and the cases of *Reg. v. Clark* (1 Moo. C. C. 376, n. (a)), and *Reg. v. Rosenberg* (1 Car. & K. 233), were cited. The Court of Quarter Sessions acceded to the application, and submitted to this Court the question, whether the case was properly left to the jury, and the conviction good.

No counsel appeared on either side.

LORD CAMPBELL, C. J.—There is no question in this case. There must be judgment for the Crown.

Conviction affirmed.

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THE QUEEN *against* CHARLES JOHN ADEY.

1850.

Saturday,
April 27.

EMBEZZLEMENT—SERVANT.

A collector of poor's rates, employed by the overseers, is properly charged with embezzlement, *as servant* to the overseers, although there are churchwardens for the same parish, who took part in making the rates.

In such case, it is sufficient to describe the money received by the collector for the rate as the property of the overseers only;—naming them.

A collector of poor's rates, as a servant to the overseers, has *authority* to receive the rates from the landlord if he will pay them to him.

Semble, He would have *authority* to receive them from any person who would pay them to him.

“ At the General Quarter Sessions of the Peace held in and for the borough of New Sarum, before the Recorder (*a*), on Monday, 31st December, 1849, Charles John Adey was charged on three counts of an indictment preferred against him.

“ 1st count charged, That being employed as servant to Henry James Bracher, and Robert Futcher, he embezzled 5s. 1½*d.* their money.

“ 2nd count charged in the same manner the embezzlement of 4s. 2½*d.*

“ 3rd count charged in the same manner the embezzlement of 2s. 10*d.* (*b*).

“ To this indictment the prisoner pleaded ‘Not guilty.’

“ Upon the trial it was proved that Henry James Bracher and Robert Futcher were the overseers of the poor of the parish of Fisherton Anger (*c*), and that they had employed the prisoner (at a salary) to collect the poor's rates. That there were two other persons churchwardens of the said parish. That it was his duty to collect from James Pavey 5s. 1½*d.*, and to enter the amount in the column of the rate book headed ‘amount actually collected;’ that he did collect the said amount and did not enter it in such column, but entered it as uncollected under the column headed ‘amount legally excused,’ and that in his account delivered of money collected and received by him the said sum of 5s. 1½*d.* was omitted.

(*a*) David Chambers, Esq.

(*b*) In the case, which was stated at great length, the counts were set out in full. We have excluded other matter also which was not material.

(*c*) Within the Borough of New Sarum.

“The circumstances attending the 4s. 2½d. were the same, except that the name of George Hopkins (from whom he received it) did not appear as ‘occupier’ in the rate book, (the space for the name of the occupier being left blank, and the name of Sir W. Medlicott being inserted under ‘name of owner,’) that instead of entering the amount under ‘amount legally excused,’ it was entered under the column ‘otherwise not recoverable.’

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“The third charge of 2s. 10d. was the same as the next preceding, except that it was received from Mary Ann Hopkins, the wife of George Hopkins.

“Upon these facts it was objected on behalf of the defence by the counsel for the said prisoner:—

“1st. That the said Charles John Adey was not the servant of the prosecutors (Henry James Bracher and Robert Fletcher), for the purpose of receiving the money as in the second and third counts mentioned, inasmuch as the name of the said George Hopkins not being in the said rates he was not bound to pay the rates, therefore the said Charles John Adey had no right to demand or receive the same from him.

“2ndly. That as the name of the said George Hopkins was not inserted in the said rates, the said Charles John Adey did not, nor could receive and take the money by virtue of his employment as servant for and in the name of and on the account of the prosecutors; he not being empowered so to do: the said Charles John Adey only having an authority to collect from persons whose names appeared in the rate.

“3rdly. That the money collected was not nor could be the property of the said Henry James Bracher and Robert Fletcher, inasmuch as they themselves could not collect nor enforce payment of the same from the said George Hopkins, his name not appearing on the said respective

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rates, and therefore the said Charles John Adey had no right nor authority to receive it on their account.

“ 4thly. That the said moneys as laid in all the counts were not the property of the said Henry James Bracher, and Robert Futcher, inasmuch as there were churchwardens as well as overseers of Fisherton, and that if the money belonged to the overseers at all it was the joint property of and belonged to the overseers and churchwardens, and ought to have been laid as such in the indictment, and not as the property of the said Henry James Bracher and Robert Futcher (the prosecutors) alone ; therefore that the moneys were improperly laid in the three counts respectively, and consequently the indictment was bad.

“ The recorder overruled all these objections, but reserved the questions of law for the consideration of this Court. The jury found the prisoner guilty on all the counts. He was admitted to bail conditioned to appear at the next General Quarter Sessions of the Peace for the said borough to receive judgment.”

Arney, for the prisoner.—First, as to the cases in the name of Hopkins. As that name was not upon the rate book as the occupier of the premises it could not be said that the prisoner was the servant of the overseers for the purpose of collecting any money from him. It had always been held that the poor's rate is personal, and is to be considered as leviable upon the occupier. [Lord *Campbell*, C. J.—The power to enforce the rate is one question ; whether received by the prisoner as servant is another.] There was no evidence as to the authority of the collector. The question is whether at the time when he set out for the purpose of collecting those rates he was clothed with authority to receive the money from Hopkins. [*Cresswell*, J.—Would he not have authority to receive from any person who would pay him?] If he had it could not be said to be

within the scope of his employment. [*Parke*, B.—It is clear that he had authority to receive from the landlord, if he would pay him. But what do you say to the other count ?] There is another objection, that he was not the servant of the overseers only. [Lord *Campbell*, C. J.—Is there not evidence of authority.] He did not say there was not authority in *Pavey's case*, but it could hardly be contended that the prisoner received the money by virtue of that authority. Then the property ought to have been laid in the indictment as the property of the churchwardens and the overseers, naming them. [*Parke*, B.—The rate is made by the churchwardens and overseers, but the prisoner was employed by the overseers to receive it]. The question is whether it was not incumbent upon the overseers to have shown that they had some special property in the money. [*Alderson*, B.—The indictment says that he was employed by those persons, and that he did receive the money.] But the overseers only stand in the situation of a clerk, where the property would be in the employer. [Lord *Campbell*, C. J.—State what allegation is not substantiated.] That the property was the property of the overseers. He submitted that this was not the property of the overseers. [*Alderson*, B.—The overseers would be liable for the money.]

LORD CAMPBELL, C. J.—The Court is of opinion that upon the first count there must be judgment for the Crown, it is therefore unnecessary to consider the others.

Conviction affirmed.

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TRINITY TERM,

IN

THE THIRTEENTH YEAR OF THE REIGN OF VICTORIA.

CORAM

WILDE, C. J.,
ALDERSON, B.,PATTESON, J.,
COLERIDGE, J.,

PLATT, B.

THE QUEEN *against* MOORHOUSE JAMES.*Case reserved by the Honourable Baron Alderson.*

1850.

*Saturday,
June 1.*

REFUSAL TO MARRY.

Qy. Whether a refusal by a minister of the established church to marry an applicant (all temporal formalities having been properly performed) on the ground that he has not been confirmed, and will express no desire to be confirmed, is an indictable offence; if so,

In order to support the indictment, the parties must both have presented them-

selves, for the purpose of being married, within canonical hours.

The indictment must aver that the parties might have been lawfully married.

“THE defendant was tried before me, at the last Assizes for Liverpool, on the following indictment:—

“Lancashire, to wit. The jurors for our Lady the Queen, upon their oath, present, that heretofore and after the 1st day of March in the year of our Lord 1837, to wit, on the 14th day of May, in the year of our Lord 1849, to wit, at the parish of Leigh in the County of Lancaster, one Henry Fisher, bachelor, being desirous of contracting a marriage with one Ann Hardman, spinster, duly gave a notice under the hand of him the said Henry Fisher, and bearing date the day and year last aforesaid, to one John Heyes, then and still being the Superintendent Registrar of Marriages of and for the district of Leigh Union, in the said county of Lancaster, pursuant to the provisions of an Act of Parliament made

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and passed in the Sessions of Parliament holden in the 6th and 7th years of the reign of his late Majesty King William the Fourth, intituled, 'An Act for Marriages in England;' and in the form of Schedule (A) to the said Act annexed, that a marriage was intended to be had within three calendar months from the date thereof, between him the said Henry Fisher and the other party in the said notice named and described (that is to say), the said Ann Hardman, spinster, at a certain church within the said district of Leigh Union, being the district of the said John Heyes as such Superintendent Registrar as aforesaid, (that is to say) a certain church called St. Thomas's Church, Bedford, they, the said Henry Fisher and Ann Hardman, having before then dwelt at Bedford, within the said district, during more than one calendar month then next preceding. And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Heyes, so being such Superintendent Registrar as aforesaid, immediately upon the giving to him of the said notice as aforesaid, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, did duly file the said notice and keep the same with the records of his office; and did also forthwith enter a true copy of the said notice fairly into the book for that purpose furnished to him by the Registrar General, called 'The Marriage Notice Book,' and kept by him the said John Heyes, as such Superintendent Registrar as aforesaid, for the purpose aforesaid, in pursuance of and in obedience to the provisions of the said Act of Parliament in that behalf. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards and after the expiration of twenty-one days after the entry of the said notice in the said book as aforesaid, to wit, on the 12th day of June, in the year aforesaid, to wit, at the parish aforesaid, in the county aforesaid, he the said John Heyes, then being and continuing such Superintendent Registrar as

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aforesaid, did, upon being thereunto requested by the said Henry Fisher, the party by whom the said notice had been and was so given as aforesaid, issue under his hand a certificate pursuant to the provisions of the said Act of Parliament, and in the form of Schedule (B) to the said Act annexed; no lawful impediment being shown to the satisfaction of the said John Heyes why such certificate should not issue; and the issue of such certificate not having been sooner forbidden in manner in the said Act mentioned by any person or persons authorized in that behalf, as in the said Act is provided, in and by which said certificate he the said John Heyes, such Superintendent Registrar of the said district of Leigh Union, in the said county of Lancaster, did certify in manner and form by the said Act of Parliament directed and required; that on the 14th of May, 1849, notice was duly entered in the marriage notice book of the said district of the marriage intended between the parties therein named and described, delivered under the hand of the said Henry Fisher, one of the said parties; that is to say, the said Henry Fisher, bachelor, and Ann Hardman, spinster, at the church called Saint Thomas's Church, Bedford. And the jurors aforesaid, upon their oath aforesaid, do further present, that at the respective times of the entry of the said notice and of the issuing of the said certificate by the said John Heyes, as such Superintendent Registrar as aforesaid, and from the said respective times continually until and at the time of the committing of the offence hereinafter mentioned, Moorhouse James, late of the said parish of Leigh, in the said county of Lancaster, clerk, was and still is the officiating minister of and at the said church called Saint Thomas's church, Bedford. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards and after the issuing of the said certificate by the said John Heyes, as such Superintendent Registrar as aforesaid, and while the said certificate was in

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full force and effect, to wit, on the 2nd day of August, in the year aforesaid, to wit, at the parish aforesaid, in the county aforesaid, they the said Henry Fisher and Ann Hardman did produce and show the said certificate to the said Moorhouse James, so being such officiating minister of the said church aforesaid, and did then and there require him, the said Moorhouse James, as such officiating minister of and at the said church, to solemnize a marriage between them, the said Henry Fisher and Ann Hardman, at the said church, on or before the 14th day of August then instant; the said 14th day of August being the day on which the said notice and certificate and all proceedings thereupon would, under and by virtue of the said Act of Parliament, become and be duly void if the said marriage were not had and solemnized on or before the said last-mentioned day. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Moorhouse James, so being such officiating minister of and at the said church as aforesaid, not regarding his duty in that behalf, nor the statute in such case made and provided, heretofore, to wit, on the said 2nd day of August, in the year aforesaid, to wit, at the parish aforesaid, in the county aforesaid, unlawfully and wrongfully did refuse and neglect, although he the said Moorhouse James was so thereunto required as aforesaid, to solemnize a marriage between the said Henry Fisher and Ann Hardman, at the said church, at any time on or before the said 14th day of August, in the year aforesaid, or at any other time whatsoever, and to solemnize a marriage between the said Henry Fisher and Ann Hardman, at the said church, he the said Moorhouse James hath always continually from the time when the said certificate was so produced and shown to him the said Moorhouse James as aforesaid, and he the said Moorhouse James was so thereunto required as aforesaid, to the time of the taking of this inquisition, unlawfully and wrongfully

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refused and neglected, and still doth unlawfully and wrongfully neglect and refuse, contrary to the duty of him the said Moorhouse James in that behalf, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

“ In order to sustain this indictment, the Superintendent Registrar for Leigh, and who was also clerk to the Board of Guardians for that Union, proved that on the 14th of May, 1849, the following notice of marriage was delivered to him by Henry Fisher :—

“(COPY.) NOTICE OF MARRIAGE, PURSUANT TO 6 & 7 WILL. IV. CAP. 85, SECT. 4.

““To the Superintendent Registrar of the district of Leigh Union, in the county of Lancaster. I hereby give you notice, that a marriage is intended to be had within three calendar months from the date hereof, between me and the other party herein named and described, (that is to say,)—

Date	Name.	Condition.	Rank or Profession.	Age.	Dwelling Place.	Length of Residence.	Church or Building in which Marriage is to be solemnized.	District and County in which the other party dwells, where the parties dwell in different districts.
	Henry Fisher	Bachelor	Shipper and Grinder	20	Bedford	More than a Month	St. Thomas's Church, Bedford.	
	Ann Hardman	Spinster	Frame Tenter	20	Bedford	More than a Month		

Witness my hand, this 14th day of May, 1849,

““ HENRY FISHER.”

“ This notice was duly read on three consecutive weekly meetings at the Board of Guardians for the Union in which Leigh was situated, and duly entered in the Registrar's Book.

“ At the end of that period, the following certificate of marriage was granted by the Superintendent Registrar :—

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“(COPY.) SUPERINTENDENT REGISTRAR’S CERTIFICATE OF MARRIAGE, WITHOUT LICENCE.

“ I, John Heyes, Superintendent Registrar of the district of Leigh Union, in the county of Lancaster, do hereby certify, that on the 19th day of May, 1849, notice was duly entered in the Marriage Book of the said district, of the marriage intended between the parties therein named and described, delivered under the hand of Henry Fisher, one of the parties, (that is to say,)

Date	Name.	Condition.	Rank or Profession.	Age.	Dwelling Place.	Length of Residence.	Church or Building in which Marriage is to be solemnized.	District and County in which the other party dwells, where the parties dwell in different districts.
	Henry Fisher	Bachelor	Shipper and Grinder	20	Bedford	More than a Month	St. Thomas’s Church, Bedford.	
	Ann Hardman	Spinster	Frame Tenter	20	Bedford	More than a Month		

Date of Notice entered, May 14th, 1849.
Date of Certificate given, June 12th, 1849. } The issue of this Certificate has not been forbidden by any person authorized to forbid the issue thereof.

Witness my hand, this twelfth day of June, } JOHN HEYES, Superintendent Registrar.
One Thousand Eight Hundred and Forty-nine. }

This Certificate will be void unless the Marriage is solemnized on or before the 14th day of August, 1849.’

“ With this certificate Henry Fisher (who as well as Ann Hardman had for a month and upwards before the first notice resided within the district) called on the defendant, who was the officiating minister of St. Thomas’s Church, a district church in the parish of Leigh, on the 13th of June, 1849. Fisher’s evidence was as follows :—‘ I told him I

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was come to give notice I intended to be married next morning at St. Thomas's. He asked if I had been baptized.—I said, yes. He asked me what was my name.—I told him. He asked if I had been asked in church.—I said, No. He asked where I had been asked.—I said, At the Board of Guardians. He asked me if I had been confirmed.—I said, No. He said he could have nothing to do with me then.—I said, Why? He said he was not obliged to tell me his reason.—I said, Very well, I'll go to the Board of Guardians, and see what they say. He said, If people would be so foolish as to go to a Board of Guardians to be asked, the Board of Guardians must marry them.'

"The Superintendent Registrar also gave the following evidence :—'On the 19th of June, I called on defendant. He is Officiating Minister of St. Thomas's Church, Bedford, in Leigh district. I saw him in company with Fisher; I told my name and office. I said I had corresponded with the Registrar about it, in consequence of his refusal to marry the parties. I said the Registrar General did not consider confirmation a pre-requisite, or any legal impediment to the marriage. Defendant said he had seen Fisher before, and declined saying anything. I said, Then Fisher has something to say. Fisher put his hand into his pocket, and was about to address defendant, who refused to hear him. The defendant retired, and closed the door of his residence. I went again, on the 2nd of August, with Fisher, Hardman, and a solicitor. Whitehead, saw defendant. Whitehead said we were come about a marriage: wishful that arrangement could be made by which parties could be married on a certificate. Fisher produced it. Defendant said he supposed it was all right according to law. Fisher desired him to fix a time for marriage on or before the 14th of August. Hardman made a similar demand. Defendant said, I'll marry him when he, Fisher,

has expressed a desire to be confirmed ; the party made no reply. They then repeated the demand. Defendant said, I have given you my answer. It was after 9 p. m. when we called.'

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"No other evidence was given to alter the facts thus proved.

"It appears St. Thomas's Church was consecrated in 1840 ; but the act of consecration was not produced in evidence.

"There was a font in the church ; and a burying ground, in which interments had taken place, attached to it. But there was no proof of marriages having been, or having been seen to be celebrated there.

"Mr. *Bliss*, for the defendant, took various objections. 1st. That if there was a refusal to marry, and without sufficient reason, it was not an indictable offence, but an offence against ecclesiastical law only. 2nd. That the refusal, on the ground that Fisher, one of the parties, had not been confirmed, which was the fact, was justifiable. 3rd. That there were other reasons, apparent on the facts proved, justifying such refusal ; and that the defendant, even though he had refused on one ground only, had full right to avail himself of those objections also. 4th. That there was not a sufficient demand and tender of themselves to be married by the parties ; no readiness to be married sufficiently proved, nor any consent of parents signified to the defendant ; both parties being, as was the fact, minors. 5th. That a refusal on the 2nd of August was not sufficient, the certificate enabling the parties to be married up to the 14th August. 6th. That there was no proof of St. Thomas's being a church where marriages were celebrated.

"He made also various other objections to the indictment and to the proof given.

"I directed, as there was no dispute about the facts, a verdict for the Crown, in order that the points of law

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might be raised; and respited the judgment to the next Assizes."

Bliss, Q. C. (a), (with him *Baddeley*,) appeared on the part of the defendant. He would first call attention to the reasons for refusing to perform the marriage rite in this case. The defendant was justified in his refusal, because there was a lawful impediment which had been alleged as a reason, and it was a sufficient reason. The defendant's answer to the application of the party to perform the marriage ceremony was, "I am ready to marry you when you are desirous of being confirmed." The objection was, that the party had not been confirmed, nor would he express any desire to be confirmed. That confirmation was necessary to the solemnization of the marriage ceremony would appear from the rubric, the canons, and the opinions of most celebrated divines. There was, in all cases, an inherent right in the minister to abstain from performing the ceremony until the parties were in a fit state to receive the rite. The formularies of the liturgy require in the parties a degree of fitness, and that they be in a certain state of grace; for, although the marriage ceremony is no longer considered a sacrament, it is something more than a mere legal contract: it is a ceremony in which no persons can participate unless they bear with them a degree of faith and Christian instruction adequate to the religious character of the ceremony about to be performed. At the end of the Solemnization of Marriage is the rubric, "It is convenient that the new married persons should receive the Holy Communion at the time of their marriage, or at the first oppor-

(a) Although the decision, in this case, left untouched the principal point, namely, whether, supposing all formalities to have been properly observed, the clergyman was justified in a refusal; the points raised by Mr. Bliss are in themselves so important, and, in the present temper of society, the question is so likely to occur again, that it has been thought advisable to give the general argument.

tunity after their marriage." And at the end of the Confirmation, "There shall none be admitted to the Holy Communion until such time as he be confirmed, or be ready and desirous of being confirmed." Coupling these together, they seem to imply that the newly married persons should be confirmed, or should be ready and anxious to be confirmed. If they are to receive the communion at the first opportunity after their marriage, it is necessary that when they come to be married they should come prepared to receive the communion. The words, "it is convenient," seem to imply that it must be done at one or the other of these two occasions. [*Wilde, C. J.*—What effect has it upon the estate of marriage, if it is not done?] The question is, how far "convenient" implies an obligation. [*Alderson, B.*—According to your doctrine, dissenters cannot be married by the Church.] It may be that they may be married by other means. [*Wilde, C. J.*—They could not be before the late Act.] He might contend that "convenient" gave the option to the minister to perform the ceremony or not. The law having provided other means of matrimony was a reason why the church might insist upon its discipline, and leave others who were not disposed to conform to the authority of the church to pursue another course. The Court would be aware that the rubric was altered in the time of Edward the Sixth (*a*), and in the reign of Charles the Second (*b*); in the years 1548, 1552, and 1660. It was by the rubric of 1548 and 1552, imperative that the communion should be received by those who came to be married (*c*). The communion was by the rubric of 1552 a part of the marriage service. [*Platt, B.*—When are the parties married, before or after

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(*a*) 2 & 3 Ed. VI. c. 1; and see 2 & 3 Ed. VI. c. 21.

(*b*) 12 Car. II. c. 33.

(*c*) He here referred to the Liturgy of 1548, called "the first book," and also that of 1552.

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the communion?]

The communion service follows the vows. He apprehended it could not be denied, that until after the alteration of the rubric it was imperative to take the communion, and the question was, whether altering the liturgy dispensed with the degree of fitness which was requisite to its being received. The one rubric saying that it must be done, and the other that "it is convenient to be done," amounts to the same thing: whether "it must be done" or "it is convenient that it should be done," it is implied that the parties must be fit for it. [*Alderson*, B.—You admit that it may be received afterwards; unless they have the power of prophecy, they cannot tell that they will not be fit to-morrow.] He then referred to the canons of 1603, which were instituted when the communion was imperatively necessary to the marriage service. The 68th canon provides a punishment on refusal to bury or to christen; the 60th canon relates to confirmation; the 26th and 27th canons provide that offenders and schismatics be repulsed from communion: but there is no canon which provides any penalty for refusing the rite of marriage, because the rubric gives the clergyman the power to decide whether there is any lawful impediment: it gives him a general authority. There were many authorities in the church who had adopted those views since the last alteration of the rubric. He referred to "Notes on the Common Prayer" (*a*); Com. de imped. matri. (*b*); Hooker, (*c*); Discourse on Confirmation, by Jeremy Taylor (*d*); Cardwell's History of Conferences (*e*); Bishop Wilson's Works (*f*); he also referred to Dr. Hook's Works (*g*); Archbishops Sharpe (*h*)

(*a*) By Overall, Cousins, and Andrews. He read from Nichols's Commentary on Common Prayer, additional notes, p. 60.

(*b*) P. 61.

(*c*) Vol. 2, p. 433. Hooker wrote before the alteration of the Liturgy, when confirmation was necessary.

(*d*) Vol. v. p. 666. By Eden, "Discourse on Confirmation."

(*e*) Pp. 331—354; answer given, p. 360.

(*f*) Vol. i. p. 25.

(*g*) P. 604.

(*h*) P. 9. A. D. 1700.

and Grindall (*a*). [*Platt*, B.—Is it necessary to experience the desire to be confirmed before marriage? it may come upon him afterwards.] He apprehended the fitness must precede the rite; how was it before the stat. 26 Geo. II. c. 33, by which all parties were required to be married in the church? That statute (which may have affected the rubric as previously in force) having been repealed, the old law of the church was revived in its fullest force. The stat. 6 & 7 Will. IV. c. 85 (*b*) (under which the indictment is framed), however, alters the rubric so far as the publication of bans is concerned, and so far only. Part of the argument against the defendant derives force from the infrequency of the administration of the communion.

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Another lawful impediment was that the parties were at the time living in a state of concubinage, that they were both in a state of impenitence and sin, *Lapsley v. Grierson* (*c*). [*Wilde*, C. J.—What could be a more decisive proof of repentance than coming to be married? *Alderson*, B.—Previous cohabitation is not stated as an impediment to marriage: that point however is not reserved in the case.]

The next objection was, that the parties were not of age, and there was no evidence of the consent of parents. The 62nd and the 100th canons of 1603 expressly forbid the clergy to marry minors without the consent of the parents. [*Alderson*, B.—Giving notice at registrar's office is equivalent to a publication of bans. The minister should marry if the bans are published.] Council 1322, (Reynolds,) Johnson's Can. Law. 1347.

The next point was, that the minister was to be the judge whether there was any impediment to the performance of the ceremony, and here he had adjudged that an impediment existed. [*Alderson*, B.—You say that if he exercises his judgment *bonâ fide* it is not a matter on which he can be indicted.]

(a) P. 11. A. D. 1571. (b) Sec. 1. (c) 1 Cl. & Fin. N. S. 498.

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The next point was that the facts of this case did not disclose any offence within the statute. There was not a sufficient tender of the parties to be married; the woman was certainly present upon the last occasion, but that was at nine o'clock in the evening, whereas it was the duty of the parties to have presented themselves at a time when they could have been married, 7 Will. IV. & 1 Vict. c. 22, s. 36. The offence is, not refusing to solemnize a marriage whenever the parties may present themselves; it is, not solemnizing the marriage after the notice and certificate, in like manner as after the due publication of bans; that is, in the ordinary course and during canonical hours. If this is any offence at all, it is purely an ecclesiastical offence; but it is at the most only expressing an intention of breaking the law. That might have been removed before the 14th August, or the party might not have called upon the defendant to perform the ceremony at the time. Supposing that they had a right to be married whenever they presented themselves in canonical hours, or whatever else the clergyman was bound to do, he was not bound to make any previous arrangement. [*Patteson*, J.—It may be a question whether his refusal altogether did not render any further application unnecessary.] *Phillpotts v. Evans* (a); *Ripley v. M'Clure*, (b). There can be no refusal until there has been a performance of the condition precedent; until then the duty does not arise, the words of the statute are “not marrying,” not “refusing.” This was not an absolute refusal to marry, only a conditional one.

Another objection was, that there was a variance at the trial, upon the notice; the notice was improperly described.

Another objection, that there was no statement that the church was within the Leigh Union.

There was no proof that the chapel was licensed, nor that

(a) 5 M. & W. 475. See S. C. affirmed, 19 L. J., 195, Ex.

(b) 18 L. J., 419, Ex.

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the parties lived within the district of the chapel. If the chapel was not licensed for the celebration of marriages, no offence had been committed. Stats. 6 & 7 Will. IV. c. 85, ss. 26, 39, and 7 Will. IV. & 1 Vict. c. 22, ss. 33, 34 (a). The only evidence was, that marriages had taken place in the church. That was not enough, because they might have been solemnized under special licences ; a presumption may have arisen that marriages had been celebrated there, but that was not stronger than the presumption of the innocence of the defendant. It was necessary to have produced the bishop's licence : it was also necessary that one of the parties should have lived within the district (b). The district alluded to in the case is the district of the union, and not of the chapel. [Alderson, B.—The union includes the whole parish.]

He had to submit that this was not an indictable offence : in the statute there were no words expressly making this an indictable offence. 7 Will. IV. & 1 Vict. c. 22, s. 36. The act of marriage is a private right, and the Act complained of is not one that concerns the public. *Davis v. Black* (c) was a case where a party brought an action against a clergyman for refusing to marry, and although the case went off on another point, the Court expressed great doubts whether such an action could be maintained ; but, allowing that an action might be maintained, it did not follow that an indictment would lie ; the presumption would be the contrary, for if the party had a private remedy it would go to show that it was not a public grievance, *Rex v. Richards* (d). [Alderson, B.—The difference between this case and that of a public right, is that a public right concerns everybody, this only the particular individual. Here the refusal applied to the individual only, the trial of the right

(a) See *Taunton v. Wyborn*, 2 Camp. 297 ; *Rex v. Northfield*, 2 Doug. 659 ; *Rodwell v. Ridge*, 1 C. & P. 220 ; *Gregory v. Tuffs*, 6 C. & P. 271 ; *Galbini v. Laborie*, 5 T. R. 244.

(b) 7 Will. IV. & 1 Vict. c. 22, s. 34.

(c) 1 Q. B. 900 ; *S. C.* 1 G. & D. 432.

(d) 8 T. R. 634.

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as to one does not affect others. *Patteson*, J., referred to *Rex v. Prin* (a). *Coleridge*, J., to *Reg. v. Nott* (b);] *Rex v. Pawlyn* (c), and cases cited in *Bac. Abr.* (d); *Green v. Buccle-churches* (e); *Crowther's case* (f); *Rex v. Ledg-ingham* (g). [*Alderson*, B.—Does the statute here command him to do it.] He thought not. There were words in the statute which showed that there was no intention to give a remedy in the temporal Courts: “he shall solemnize marriage after such notice and certificate as aforesaid, in like manner as after the publication of bans.” [*Alderson*, B.—That may make it a matter for the judgment of the Ecclesiastical Court.] Coupling that with the former declaration that “the rubric shall be observed,” he thought it was clear that it was a matter for ecclesiastical jurisdiction only. *Co. Litt.* (h). “And here is implied a maxim of the common law, that where the right is spiritual and the remedy thereof only by the ecclesiastical law, the conusance thereof doth appertain to the Ecclesiastical Court.” Again (i), “another maxim of the law, that where the statute or common law giveth remedy *in foro seculari*, (whether the matter be temporal or spiritual,) the conusance of that cause belongeth to the king's Temporal Courts only; unless the jurisdiction of the Ecclesiastical Court be saved or allowed by the same statute to proceed according to the ecclesiastical laws.” He apprehended this statute gave no remedy *in foro seculari* whatever. The Act of Uniformity (k) and all the other statutes (l) re-enact the rubric. There were

(a) 11 Ad. & E. 727.

(b) 4 Q. B. 768.

(c) 2 Sid. 208.

(d) “Indictment” (E).

(e) 1 Leon. 323.

(f) Cro. Eliz. 655.

(g) 1 Mod. 71; *Id.* 288.

(h) 96, a.

(i) Co. Litt. 96, b.

(k) 2 & 3 Ed. VI. c. 1, perpetuated by 5 Anne, c. 5.

(l) See 2 & 3 Ed. VI. c. 21; 13 Car. II. c. 23; 6 & 7 Will. III. c. 6; 7 & 8 Will. III. c. 35; 9 & 10 Will. III. c. 35; 4 Anne, c. 12; 10 Anne, c. 19; 6 Geo. II. c. 33; 4 Geo. IV. c. 76.

many cases upon this point: *Lionel Copley's case* (a); *Middleton v. Croft* (b); *Clerk v. Aldrich* (c); *Nicholson v. Squire* (d); *Wenmouth v. Collins* (e). These were all authorities to show that unless the statute gives an authority to the temporal Courts, the authority of the Ecclesiastical Courts is not taken away. There is no precedent in the law, of not marrying upon publication of banns, being a temporal offence.

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The next point was, there was no averment on the record that the parties might lawfully marry. Such an averment was necessary. "Where by any law or canon in force, before the passing of the said Act, it is provided that any marriage *may* be solemnized after publication of banns." Stat. 7 Will. IV. & 1 Vict. c. 22, s. 36. [*Alderson*, B.—Consistently with this case, they might have been half-brother and sister by different fathers.]

Next objection, no averment that the parties were ready and willing and in a condition to marry on the 14th, or at any time when they required to be married, *Davis v. Black* (f). [*Wilde*, C. J.—And no averment that they continued ready and willing.] No.

Another point was, that there was no averment on the record that the church was within the registrar's district. The registrar has no power to issue a certificate for marriage out of his district, *Ex parte Brady* (g).

Again, there was no averment that the church was one in which marriages could be solemnized. It is, by stat. 6

(a) Hard. R. 406.

(b) 2 Stra. 1056.

(c) 2 Wils. 78.

(d) 16 Ves. jun. 259 a.

(e) 2 Ld. Raym. 850; see also *Rex v. Coleridge*, 2 B. & A. 806; *Titmarsh v. Chapman*, 1 D. & L. 732, mode of burying dead; *Rex v. St. Peter's*, 5 T. R. 364, making church rates; *Barnes v. Shore*, 8 Q. B. 640, irregularities in performance of service; *Ex parte Williams*, 4 B. & C. 313; *Wilson v. Greaves*, 1 Burr. 241, brawling in church; *Searle v. Williams*, Hob. 290; 4 Inst. c. 64; Com. Dig. "Prohibition."

(f) 1 Q. B. 900; 1 G. & D. 432, S. C.

(g) 8 Dow. 332.

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& 7 Will. IV. c. 85, s. 39, made a felony to marry in any other than a licensed church.

There was no averment that the notice stated that the church was in the district. [*Patteson*, J.—It is a little ambiguous; “being in the district,” may have been intended as an averment that it was in the district.] That would not do for a finding of the jury.

It was not shown in the indictment that the defendant was in holy orders of the Church of England, or a person who could solemnize marriage. It merely says that he was a minister of the church; that might have been of a Catholic or Presbyterian chapel. [*Coleridge*, J.—He is called “clerk.”] That applies equally to the minister of a Roman Catholic chapel; besides, it applies to his condition at the time of the indictment, and not at the time of the offence said to have been committed. For these reasons he thought the indictment could not be supported.

Crompton (with him the *Attorney-General* and *Knowles*, Q. C.), in support of the conviction.—This was a criminal offence as being a disobedience and contempt of the Statute. The crime is, that on the 2nd of August he refused, because at that time he was required to take the proper steps and make an appointment, which he was bound to make within the rubric. If he says he will not do it at the time, the parties could take no other course; they could not go and make a demand in the parish church, creating a disturbance; when were they to go to the church? there was no reason for any particular day or time. [*Alderson*, B.—How do you get over the objection that there was no sufficient tender?] The fallacy arose from considering this in the same way as a tender of money (a).

(a) *Crompton* had argued thus far, when the *Attorney-General*, who had been a short time absent, returned into Court, and said that the great point which it was desired that the Court should consider, was whether the clergyman had a right to refuse. He felt he had no right to ask the Court to enter into a

WILDE, C. J.—It appears to me that this case has failed upon its merits. He was not called upon to perform the service at a time when it could have been performed.

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ALDERSON, B.—It is perfectly clear there was no sufficient tender; and I cannot get over the want of an averment, that these were parties who might have been legally married.

PATTESON, J., COLERIDGE, J., PLATT, B., concurred.

speculative question, which it was not necessary for the Court to decide.
[Wilde, C. J.—We must direct our attention to those points submitted to us, and which it becomes necessary for us to decide.]

THE QUEEN *against* WILLIAM CASE.

1850.

Saturday,
June 1. (a)

ASSAULT.—DIRECTION TO JURY.

Where a medical man had connection with a girl, fourteen years of age, under pretence that he was treating her medically; and the jury found that at the time the girl was ignorant of the nature of the act, and that, confiding in him, she offered no resistance, but did not consent, it was held that he was properly convicted of an assault.

“ WILLIAM CASE was tried before me, at the last April Quarter Sessions for the Borough of Dover, for an assault upon Mary Impett.

“ The defendant was a medical practitioner, and Mary Impett, who was fourteen years old, was placed under his professional care by her parents, in consequence of illness arising from suppressed menstruation. The defendant gave her medicines, and on the occasion of her going to his house and informing him she was no better, he observed, ‘ Then I must try further means with you.’ He then took hold of her and laid her down in his surgery, lifted up her clothes, and had carnal connection with her; she making no resistance, believing (as she stated) that she was submitting

The question of fraud or no fraud, as the means of obtaining a consent in such a case, need not be specifically left to the jury for them to find as a fact; it is sufficient if the case is so left to them that fraud in law, or no fraud, must be assumed from their verdict upon the case as left to them.

It would not be proper to leave it to the jury to say whether the act was done with a view to cure the girl of an illness from which she was suffering; because, such an act could not be so justified.

A consent obtained by fraud is equivalent to no consent.

On an indictment for an assault the prisoner may be convicted, although upon the evidence the offence should amount to a rape.

Semble, consent or no consent may depend upon the age of the party, regard being had to the probability of her being deceived as to the nature of the act.

(a) This case first came before this Court in Easter Term last, on Saturday, April 27, when *Horne*, for the prisoner, applied that the case might be sent back to the Recorder to amend, on the ground that a material fact was not stated; and that the case was so stated that the proper question was not raised for the consideration of the Court, even if any question was raised at all.

Lord Campbell, C. J.—Suppose the case to be perfect upon the face of it, it would lead to bad consequences if gentlemen were to be allowed to rise and say that the case was improperly stated. Is Mr. Bodkin [the Recorder who submitted the case] dissatisfied with the statement? You had better refer the matter to him. Let it stand over.

to medical treatment for the ailment under which she laboured.

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“The defendant’s counsel, in his address to the jury, contended that the girl was a consenting party, and therefore that the charge of assault could not be sustained.

“I told the jury that the girl was of an age to consent to a man having carnal connection with her, and that if they thought she consented to such connection with the defendant, he ought to be acquitted; but that if they were satisfied she was ignorant of the nature of the defendant’s act, and made no resistance solely from a *bonâ fide* belief that the defendant was (as he represented) treating her medically with a view to her cure, his conduct, in point of law, amounted to an assault.

“The jury found the defendant guilty; and he was sentenced to be imprisoned for eighteen calendar months in the borough gaol, where he now remains.

“I have to pray the judgment of my Lords and Barons, sitting in a Court of Appeal, whether my direction to the jury was correct in point of law?

“WM. H. BODKIN,

“Recorder of Dover.

“April, 1850.”

Horne, for the prisoner. [*Coleridge*, J.—“Making no resistance” cannot be carried further than the mere negative.] He apprehended that it might be taken to mean assent, and where there is a consent in fact it is no longer an assault. [*Coleridge*, J.—Look at the other part of the evidence, “Then I must try further means with you;” this must have been understood as medical means.] If the act had appeared to be the result of fraud or of misconduct, on the part of the prisoner, that is a question which should have been left to the jury and found by them as a fact; but the jury found no such fact; and the means employed, it

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would appear, had really produced the required effect ; and much as the act itself was to be reprobated, this Court would not assume fraud, although the facts would, no doubt, have warranted the jury in coming to that conclusion. [*Alderson*, B.—Surely the jury have found that there was fraud here.] The question was not put to them, and they did not find it, and we are not now to assume what they would have found. [*Platt*, B.—Do you contend there may be imposition and no fraud?] He did not mean to contend that ; but the question here really was whether there had been a consent in fact, because if there had been, and it had not been brought about by fraud, the prisoner was entitled to an acquittal on this indictment. [*Patteson*, J. read the direction of the learned Recorder. *Alderson*, B.—“As he represented,” must mean “falsely represented.” If you concede that position you cannot argue this case ; fraud being assumed, I think you are out of Court.] He referred to *Reg. v. Read* (a), and said that the definition of assent was well put in a note to that case : he also referred to *Reg. v. Martin* (b), *Reg. v. Banks* (c), *Reg. v. Meredith* (d). It is a well-established rule that children may give an assent, and thereby prevent the fact from amounting to an assault. It might be said that this was no consent, but it was a consent ; in fact an idiot might consent, *Reg. v. Ryan* (e),

(a) 1 Den. Cr. Ca. 377 ; and see *S. C.* infra, p. 52 ; 18 L. J., M. C. 88 ; and 13 Jur. 68.

(b) 2 M. C. C. 123 ; 9 C. & P. 213, *S. C.*

(c) 8 C. & P. 574.

(d) 8 C. & P. 589.

(e) 2 Cox, Cr. Ca. 115 ; and see per *Alderson*, B., in *Reg. v. Read*, supra, p. 54. In the endeavour to ascertain whether an idiot did or did not consent, there being no direct evidence, the only possible course is to leave it to the jury as a probability arising from her general conduct : this course was pursued in *Reg. v. Ryan*, which was an indictment for a rape upon an idiot ; one so completely an idiot, that when asked questions in the witness box, (according to the report,) was evidently unconscious of their purport, and not in a condition to understand right from wrong. In that case, *Platt*, B., asked the girl's father as to her general habits and character, with the view of eliciting the probability of her having been a consenting party. Her father

and so may a child of tender years. [*Platt*, B.—The prosecutrix did not consent to a pollution of her body.]

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stated her general habits to have been those of decency and propriety, and in summing up, his Lordship said—"The question is, did the connection take place with her consent? It seems that she was incapable of judging, and it is important to consider whether a young person in such a state of incapacity was likely to consent to the embraces of this man; because if her habits, however irresponsible she might be, were loose and indecent, there might be a probability of such consent being given, and a jury might not think it safe to conclude that she was not a willing party. But here the presumption is that the young woman would not have consented; and if she was in a state of unconsciousness at the time the connection took place, whether it was produced by any act of the prisoner or by any act of her own, any one having connection with her would be guilty of a rape. If you believe that she was in a state of unconsciousness, the law presumes that the connection took place without her consent, and the prisoner is guilty of the crime charged." The prisoner was found guilty.

We have, as a fact to start with, an *idiot*, unconscious of the meaning of questions put to her, not in a condition to understand right from wrong, and incapable of exercising any judgment, and the jury are called upon to give a direction and a character to her mind. There are different degrees of idiocy, but the principle here asserted is general*—"that an *idiot* may consent." Who is an idiot? "An idiot, or natural fool, is one that hath no understanding from his nativity, and therefore is by law presumed never likely to attain any," (Fitz. b. 1, c. 11, s. 10). "He who from his nativity is by a perpetual infirmity *non compos mentis*," (Co. Litt. 247 a). "One *sine mente*, without his mind or discretion," (Ib). "He who shall be said to be an idiot from his birth, is such a person who cannot account or number 20 pence, nor can tell who was his father or mother, nor how old he is, &c. So, as it may appear, he hath no understanding of reason what shall be for his profit or what for his loss. But if he hath any understanding, that he know and understand his letters, and read by teaching or information of another man, then it seemeth he is not a natural idiot," (Fitz. N. B. 233).† "A man is not an idiot if he hath a *glimmering* of reason, so that he can tell his parents, his age, or the like common matters," (Jac. Law Dic. "Idiot").

These are some of the many legal definitions of an idiot, with which me-

* See per Alderson, B., in *Reg. v. Read*, sup. p. 54.

† Lord Hale, 1 P. C. c. 4, p. 29, adopts Fitz. but adds, "These though they may be evidences, yet they are too narrow and conclude not always; for *idiocy* or *not* is a question of fact triable by jury, and sometimes by inspection," and see Dyer, 25; Moore, 4, pl. 11; Bro. "Idiots," Lord Hale, p. 84, says also, "A man that is *surdus et mutus a nativitate* is, in presumption of law, an idiot," &c. Such a presumption could, however, scarcely exist at the present day in the mind of any one who was at all acquainted with our Deaf and Dumb Asylums.

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Perhaps not ; but that observation equally applied to the case of *Reg. v. Read*, where it was held that the child

dical writers generally agree, except that they insist on various degrees of idiocy as of lunacy. Guy, in his *For. Med.* 220, after a general description of idiots, observes of them, that "Sensation is not followed by perception ; their attention cannot be roused, and they are therefore incapable of instruction ; they shew scarcely a trace of memory, judgment, or imagination, and have even less instinct than the brutes." And then, again, "Some idiots display slight glimpses of intelligence : their attention can be roused by strong impression on the senses : they look at certain objects, go for their food and take it, and recognise those who take care of them, indicate the objects of their desires by cries and gestures, manifest pleasure and pain, but are helpless, require to be dressed and undressed, put to bed, and placed where they are to remain. Others can move from place to place, go through a routine of movements, laugh mechanically, utter inarticulate sounds, as if for amusement, hum some simple airs, become attached to particular places and persons : they are, however, deficient in powers of thought and attention, and when left to themselves are careless, slothful, filthy, lazy, and timid. At the period of puberty they display their sexual passion by offensive gestures and habits, are subject to *attacks of nymphomania*, or satyriasis, and to *fits of violence* ; or they grow dejected, and sink under a gradual decay of health, (*Guy's For. Med.* 222, where see further description).

Taking into account the natural prejudice which arises against any man who is proved to have had connection with such an unfortunate creature, and the disposition to punish such a one, perhaps severely, it must be confessed that the odds are very greatly against the prisoner. A jury, composed of persons who, perhaps, have never before given the slightest consideration to the subject, and are at the moment unable to attach to it the importance it requires, are called upon to decide upon the probability of the *consent* of the prosecutrix, which can alone have had its origin in a *mind*, have been an impulse of nature, or the consequence of an affection of the generative properties. To take her previous habits as a test of her conduct on a subsequent occasion is most fallacious.* It is adopting a test whereby to judge of her mind as influencing her conduct.† How can they judge of that which is not ? But they do judge : they judge of the probability of an idiot's acts by the impression, which their knowledge of human nature in its more perfect condition, has produced upon their mind. Would a jury, composed of persons who had

* In a case (rape) which occurred at Liverpool Ass. Mic. 1844, the prosecutrix was a deaf and dumb woman, with scarcely any understanding, and *Pollock*, C. B., said, "It may be permitted to inquire into the life and character of the woman, to judge what effect is to be given to certain parts of her conduct."

† About four years ago, a counsel, defending a prisoner at Liverpool for bestiality with an ass, asked the jury whether they thought the ass would have submitted to such a degradation.

assented, not knowing what she was about. No question was there raised, whether she knew the character of the act.

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studied for one week under a medical man well versed in these matters speculate upon such a possibility, and come to an adverse conclusion? No medical man has ever attempted to explain the operation of an idiot's mind. Locke, and other writers of the same class, do not venture upon it; and why? because it is not. But it may be said, Can we not judge of the probability of certain acts in animals? We may, from their known habits and instincts, when perfect and unimpaired; but who would attempt to give a direction to the instinct of a mad dog beyond universally acknowledged facts? Again, who are to testify to these qualities? Those who have been always associated with her; her friends, whom she fears, and in whose hands she has always been a mere passive instrument. An idiot may probably, from many other than moral influences, such as fear, exclusion from society, &c., conduct herself generally with modesty and propriety. Of morality she knows nothing, "not knowing right from wrong." She is possessed, in all probability, of those feelings which are the inheritance of all living creatures; what is to check them in the absence of fear, &c.? She may never before have evinced any desire for sexual intercourse; a variety of circumstances, not excepting nymphomania, may have fired her passion: she may have played the wanton in some phrensied moments, and have been herself the party to solicit the desired intercourse. Can the prosecutrix herself be evidence of her acts? If she could, in fact, what guarantee would there be for the truth of her statement? But she cannot: that which may have influenced her acts is gone, and the poor creature in the witness-box is again a passive idiot, forgetful of the past as of a dream never to be remembered."*

It is never safe to convict a man of a rape upon an idiot, from the mere fact that he has had connection with her, and the *probability* of her non-consent. It would be better to make it an illegal offence to have connection† with an idiot, supposing we could mark the boundary.‡ Let the boundary be the ordinary capacity of a child under ten years, in the estimation of the jury, whose province it always has been to decide—whether idiot or not idiot? (1 Hale's P. C. c. 4, p. 29; Dyer, 25; Moore, 4, pl. 11; Bro. "Idiots").

* "A man cannot know or remember what acts he did when he was of non-sane memory," (1 Hale's P. C., c. 4, p. 29, note (a); and see Hale's P. C., p. 86.) "Lunacy may be given in evidence under a plea of *non est factum*."—(*Yates v. Brown*, Stra. 1104).

† The connection is always illegitimate, because "an idiot cannot marry; for marriage is a civil contract, the basis of which is *consent*, which idiots are incapable of giving, and therefore of entering into that or any other contract. Such a marriage is absolutely void," (see Shelf. on Lunatics, 575, and cases there cited).

‡ "Idiocy may differ from itself in strength by an infinity of shades; few, if any, distinguishable by any exact criterion, or measurable by any applicable scale," (1 Bent. Rat. of Ev. 165).

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That is a direct decision, that where there is an assent it is no assault. [*Alderson, B.—Read's case* was submitted as one of actual consent.] In order to prevent its being an assault the age of the party consenting is immaterial. [*Alderson, B.—Unless in a case where the party is induced to believe the act to be different in its nature from that which it really is.*] In this case it is not found that the prisoner acted *malâ fide*, and it does not necessarily follow from the facts that he did; it is clear he acted with the consent of the prosecutrix, and that it had the effect of curing her. [*Coleridge, J.—The man could have no right to pollute her body; making no resistance is not consenting.*] The case ought to have been left to the jury differently, *Reg. v. Nicholl (a)*. In that case, the facts of which were very similar to the present, the learned Judge left it to the jury to say whether the prosecutrix had consented in fact; and the Judge afterwards held that the prisoner might be convicted of a common assault, on the ground that there was sufficient evidence that the act might have been against her will, although she did not resist; here there was no such evidence. He would call attention to *Reg. v. Saunders (b)* and *Reg. v. Williams (c)*, both of which cases he submitted ought to be reconsidered; they were cases of the woman consenting, believing the man to be her husband; and the party was found guilty of an assault. [*Alderson, B.—In those cases I cannot understand why it is not a rape or nothing.*] In *Reg. v. Williams*, *Alderson, B.*, said, "In an assault of this nature there need not be resistance; the fraud is enough." So, in this case, the question of fraud ought expressly to have been left to the jury. Assent obtained by fraud is equivalent to dissent; and, if penetration is effected, why is it not

(a) Russ. & Ry. 130.

(b) 8 C. & P. 265.

(c) 8 C. & P. 286. *Alderson, B.*, here observed, these were not the first cases, by many, of this species of offence.

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a rape? [*Alderson, B.*—If a man gives a woman a dose of laudanum, and while she is stupified by its effects he has connection with her, that is a rape (*a*).] Suppose the case of a lady, of unimpeachable character, to fall insensible, and a ruffian to take advantage of her in that state, the inference would be that it was against her will. [*Alderson, B.*—How can it be said that a woman did not consent or did consent when she really had no will? Suppose the jury to find that they did not know whether it was with, or without her consent, would that be an acquittal?] He thought the Court ought to acquit, because the question of consent could not be raised (*b*). In the present case, if the woman did not consent, it was a rape; and the prisoner must be acquitted upon this indictment. The two cases last cited carried the law much further than it had been carried before, by making the question to turn upon the woman's being deceived; whereas the question really is, whether the woman assented in fact. How can it, in this case, be said whether the woman assented under the representation, alone, made to her, or under the influence of her own feelings? The question was, whether there was consent; if there was, no matter how it was brought about, the act could not amount to an assault. He submitted that, in this case, there was such a consent in point of fact, although brought about by falsehood, as it was in cases of seduction. If the decision should be against the prisoner, it would hereafter be difficult, in any case where falsehood should be proved, to admit a consent. By an adverse decision, in this case, crime would be confounded; and parties, who at the time have consented, would be induced to indict with a view of saving their reputation.

(*a*) See *Reg. v. Camplin*, 1 Den. C. C. 89; 1 C. & K. 746, *S. C.* *Platt, B.*, here observed that between such a case and the present he could not see any distinction in law.

(*b*) See *Reg. v. Ryan*, 2 Cox, Cr. Ca. 115, per *Platt, B.*

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Barrow, for the Crown, was not called upon.

WILDE, C. J.—I cannot entertain any doubt upon this case. In the charge of the learned Recorder to the Jury, he treats the prosecutrix as competent to consent, and leaves it to them to say whether she did consent, and if so, that the prisoner ought to be acquitted. [His Lordship stated the facts of the case.] From the tender age of the prosecutrix it may be that she was ignorant of the nature of the act; this point was submitted to the jury. The prisoner committed the act. Was his conduct justifiable, on the ground that he did it with a view to her cure? It is objected, that this question was not left to the jury, for had it been they might have found it was done with that view. The question properly was not left to them, because the act could not be justified under any circumstances. It was said that she made no resistance; that that is equivalent to a consent, and therefore the prisoner was not guilty of an assault. A child is taken to have its tooth drawn; it makes no resistance, but it does not therefore consent. Here the girl submitted under a misrepresentation, and it turns out that there was no reason to suppose that the act was done with any other view than the gratification of a lawless passion. The child was disarmed, and she may have offered no resistance, being ignorant of the nature of the act; or relying upon the man as legitimately exercising his profession, unconscious that he was about to commit any injury upon her person. What she consented to was something different from what took place. It may be said that this was a rape; a rape includes an assault; both are assaults differing in degree. I therefore think the prisoner was properly convicted.

ALDERSON, B.—When a man obtains possession of a woman by fraud, it is against her will and consent. Here the possession of the girl was obtained by fraud and it is found that she was ignorant of the nature of the prisoner's act. I think the conviction right.

PATTERSON, J.—There is a wide distinction between active consent and passive resistance. The jury found the latter ; and, I think, correctly.

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COLERIDGE, J.—The act committed, without the consent of the child, is an assault ; here she did not consent, although she offered no resistance by reason of the fraud practised upon her by the prisoner, in whom she reposed confidence.

PLATT, B.—Inducing a person by fraud to submit to one act, cannot be translated into a consent to another act ; what she consented to was a supposed medical operation : what he committed was an assault. He was therefore properly convicted.

Conviction affirmed.

THE QUEEN *against* CHARLES HAWKINS.

1850.

Saturday,
June 1.

LARCENY.

A clerk, who receives money or goods directly from his master for a special purpose on behalf of his master, and appropriates them to his own use, is guilty of larceny and not embezzlement.

“THE prisoner was indicted at the last adjourned Epiphany General Quarter Sessions, held for the Borough of Saltash, in the county of Cornwall.

“There were three counts in the indictment (*a*). The first charged the prisoner, a clerk, with embezzling certain goods, the property of William Dummer, his master; the second count charged, in like manner, an embezzlement of money; and the third count charged a larceny of the goods and money.

“At the trial it appeared, that the prisoner had been a clerk of the prosecutor, who was a navy and army tailor, living at Portsmouth, and it was part of his duty to go on board ships and take orders for and sell clothes to the marine artillery, on account of his master. A short time before the prosecution, the prisoner had been thus employed on board the ‘Terrible,’ at Portsmouth, which ship being ordered round to Plymouth, the prisoner obtained a passage and came round in her, being first intrusted by his master with a quantity of soldiers’ clothes, and 10*l.* in silver to enable him to give change to customers.

“Whilst at Plymouth, he wrote to his master, that he could do business with the marines of the ‘Gladiator,’ a ship lying there; and upon this received a further supply of goods. Not having made any remittance, and having staid away much longer than was reasonable, the prosecutor became uneasy, and sent to Plymouth, when it was found the prisoner had entered as a seaman in the ‘Gladiator,’ and had sailed in her for the coast of Africa. Previous to the

(*a*) The counts were set out at length in the case reserved.

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vessel sailing, he wrote to his master, saying he would get all his accounts made up, and remit the money due, from Madeira (through Mr. Steele, the lieutenant of marines) at which place the 'Gladiator' was likely to touch; but it appeared at the trial, by the evidence of Lieutenant Steele, that he had never mentioned the subject to him. The 'Gladiator' was driven back to Plymouth by stress of weather, on the same day as prosecutor's assistant arrived, and the prisoner was immediately apprehended; but neither before or at the time was he asked for any account; nor did it appear he had ever refused to account, except by going to sea, as above stated, which it was contended, for the prosecution, amounted to a refusal. There was no endeavour to show that the prisoner had received any money from any persons to whom he had sold the goods of his master, except the paper annexed marked 'D.'(a), which was found in his possession; but all such goods as he had been supplied with were gone, except a few, of which the handkerchiefs and other clothes mentioned in the indictment were a part, and these goods were found in the prisoner's berth on board the 'Gladiator.'

"Upon these facts it was contended, on the part of the prisoner, that inasmuch as he had received these goods from his master, and not from any other person on his account, and also had not refused to account, he could not be

(a) D.

	£	s.	d.
Cr. "Terrible" account	7	18	10
" "	1	19	0
"Gladiator"	3	13	6
" "	0	3	0
	<hr/>		
	13	14	4
Cash	10	0	0
	<hr/>		
	23	14	4
	<hr/>		

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charged with an embezzlement of them under the statute. For the prosecution, it was contended, that there was some evidence to go to the jury, as to the embezzlement both of money and goods; but beyond all question that it was quite clear that the jury must find the prisoner guilty under the count for simple larceny.

“ These questions were fully argued before the Recorder summed up; but he directed the jury that, inasmuch as there was no evidence of receipt of any money for goods, and no demand or refusal to account, the jury must acquit the prisoner of any embezzlement of money; and did not make any comment whatever on the count for larceny, leaving it simply to the jury to say whether there was or was not any embezzlement of goods: and upon this, after being locked up for many hours, the jury gave a verdict of guilty on the first count. And, on application of prisoner’s counsel, the judgment was respited; and the prisoner for want of sufficient sureties was committed.

“ The opinion of the Judges, therefore, is now respectfully requested, as to whether the prisoner was rightfully convicted.

“ (Signed) Wm. SYMONS,
“ Recorder of Saltash, and Chairman of the
“ Saltash Quarter Sessions.”

Cox, for the prisoner. [*Patteson*, J.—How can this be embezzlement of goods received from the master? It is larceny.]

Collier, for the Crown, was called on.—There was conclusive evidence upon the third count, to which the Recorder did not direct the attention of the jury. He must admit there was much difficulty in supporting the conviction upon the first. He referred to *Whittingham’s case* (a), where it was held that if a servant received the money

(a) 2 Leach, P. C. 912; S. C., 2 Russ. on Crimes, 179.

either from the master, or from a third person on the master's account, it was sufficient to support an indictment for embezzlement (*a*). If that case was law it supported the present finding.

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WILDE, C. J.—The judgment in *Whittingham's case* is an *obiter dictum* only, and must have been associated with other matters which are not now before the court. We think this conviction cannot be supported. The offence is a larceny and not an embezzlement.

(*a*) And see *Hedgde's case*, 2 Leach, 1033.

THE QUEEN *against* HENRY COULSON AND JOHN RUSTING.

1850.
Saturday,
June 1.

PLEADING.

An indictment charging that A. unlawfully did falsely pretend that a certain printed paper was a good and valid promissory note, is sufficient, without setting out the paper.

“ LINCOLNSHIRE, Lindsey to wit.—At a General Quarter Sessions of the Peace, holden at Louth, in and for the parts of Lindsey, in the county of Lincoln, on Tuesday, the sixteenth day of April, one thousand eight hundred and fifty, before William Dodson, Clerk, Chairman; Richard Therold, Esquire, and others, Justices of the Peace of the parts aforesaid, Henry Coulson and John Rusting were tried and convicted upon an indictment for obtaining money and goods under false pretences, of which indictment the following is a copy :—

“ ‘ Lincolnshire, Lindsey to wit.—The Jurors for our lady the Queen, upon their oath, present that Henry Coulson, late of the parish of Market Rasen, in the parts of Lindsey in the county of Lincoln, labourer, and John Rusting, late of the same place, labourer, on the eighth day of January, in the thirteenth year of the reign of our Sovereign lady Victoria, at the parish of Market Rasen, aforesaid, in the parts and county aforesaid, unlawfully did falsely pretend to one John Bratlay that a certain printed paper, then and there produced by him the said Henry Coulson, and by him offered and given to the said John Bratlay, in payment for certain pigs before then agreed to be sold by the said John Bratlay to the said Henry Coulson, was a good and valid promissory note for the payment of five pounds; by means of which said false pretence the said Henry Coulson and John Rusting did then and there unlawfully obtain from the said John Bratlay five pigs, of the value of three pounds seventeen shillings and six-

pence, one piece of the current gold coin of this realm called a sovereign, of the value of twenty shillings, one piece of the current silver coin of this realm called a half-crown, of the value of two shillings and sixpence, and five pieces of the current copper coin of this realm called pennies, of the value of five pence, of the moneys, goods and chattels of the said John Bratlay, with intent then and there to cheat and defraud him the said John Bratlay of the same; whereas in truth and in fact the said printed paper was not a good and valid promissory note for the payment of the sum of five pounds, or for the payment of any sum whatever, to the great damage and deception of the said John Bratlay, to the evil example of all others in the like case offending against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity.'

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"It was proved at the trial that the prisoners acted in concert; and that Coulson offered to the prosecutor, in payment of three pounds seventeen shillings and sixpence, for certain pigs agreed to be sold by him to the prisoner Coulson, the printed paper hereunto annexed, which is commonly called a flash note, and contains the words and figures following, disposed and arranged so as to have the appearance of a Bank of England note.

' £5 Bank of Elegance.

No. 230.

No. 230.

I promise to pay on demand the sum of five Rounds if I do not sell articles cheaper than anybody else in the whole universe.

January 1st, 1850, for Myself and Co.,

Five.

M. CARROLL,

56, Albion-st. Birmingham.'

"The prosecutor said to Coulson, who tendered the note, 'I think it is not a good one.' Rusting took the note and

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examined it, and said, ‘It is a five pound Bank of England note, and will go anywhere.’ Prosecutor then took the note, and gave Coulson the change, 1*l.* 2*s.* 6*d.*, and delivered up the pigs, which he assisted the prisoners in driving part of the way. The prosecutor said he could only read very badly, and being requested in Court to read the note, said he could not read it at all.

“The Court of Quarter Sessions, before which the prisoners were tried, have reserved the following questions for the opinion of the Judges, at the request of the prisoners’ counsel:—

“First, Whether the act of putting off the printed paper in question as a five pound Bank of England note, in payment for goods, amounts to a false pretence within the statute.

“Secondly, Whether the printed paper should have been set out more fully in the indictment.

“The prisoners were convicted, and sentence was respited to the next sessions. Being unable to find bail they are still in custody.

“By the Court,

“WILLIAM DODSON, Chairman.”

Willmore, for the prisoners.—There was no averment in this case that the prisoners knew at the time they presented the paper that it was not what they represented it to be. The only question left was whether the putting off was in itself an offence. [*Platt*, B.—Was there not sufficient evidence to warrant the jury in finding a guilty knowledge?] We referred to *Rex v. Wickham* (a), as exactly in point. [*Alderson*, B.—The word “knowingly” is not in the statute; the words are “any false pretence.”] *Reg. v. Bowen* (b). Here the act alleged is a false pretence, but it is

(a) 10 Ad. & E. 34.

(b) 13 Jur. 1045.

not so necessarily within the knowledge of the party ; there is nothing in the case which goes to show *malus animus* (a).

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With respect to the second question, that the false pretence must be fully set out in the indictment, *Reg. v. Wickham* is on all fours with the present case, and supports the position for which he contended. In all the cases the false pretence is set out at full length ; *Reg. v. Philpotts* (b). [*Alderson*, B.—The only reason for setting out the document on the face of the indictment is that the Court may say whether it is an instrument upon which the party may be indicted. Apply that principle to the present case.] He then cited *Reg. v. Munoes* (c), and 1 Stark. Cr. Pl. 95.

Boden, for the Crown, was not heard.

WILDE, C. J.—It does not appear to me that the objection in this case is well founded. It is unnecessary to set out the instrument in those cases where it cannot be of any use to the Court in order that they may arrive at the conclusion, whether it is or is not a valid document. Had it been stated in the indictment as a certain paper purporting to be a good and valid promissory note, and that it was not a good and valid promissory note, it might have been necessary to set it out, in order that the Court might

(a) The Court was not understood as giving any direct judgment upon this point ; but, as the judgment given was that “the conviction must be affirmed,” it may be concluded that this objection was considered invalid ; or that the question “Whether the act of passing off the printed paper in question as a 5*l.* Bank of England note, in payment for goods, amounted to a false pretence,” was unnecessarily reserved. The question, itself, must have been answered in the negative, for, as *Alderson*, B. observed, “The prisoners might have passed the paper with the same knowledge as the prosecutor had at the time he received it.” But, we have in addition, in the case, the finding of the jury, “that the prisoners did unlawfully and falsely pretend,” &c., which finding must be taken to import a guilty knowledge (see the judgment, particularly by *Wightman*, J., in *Reg. v. Bowen*, 13 Jur. 1046) ; and therefore there was no ground for reserving such a point. Either way it amounts to the same thing, that after verdict the indictment was sufficient.

(b) 1 C. & K. 112.

(c) 2 Stra. 1127 ; S. C. (7 Mod. 315) more fully reported ; and see *Reg. v. Marsh*, *supra*, p. 192.

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have seen whether it was or was not. In this case the Court could not have derived any assistance whatever from setting the paper out; for all that appears upon the indictment it might have been nothing but hieroglyphics. The indictment states that it was a certain paper produced by the prisoners which they falsely pretended was a good and valid promissory note, whereas it was not. Where the note is required to be set out, something has turned upon the nature of the note, rendering it necessary that the Court should see it. The cases cited do not apply here. It therefore does not appear to me that the objection is well founded, and the conviction must be affirmed.

ALDERSON, B.—Where the document is stated as something material then the Court ought to see whether it is so, otherwise it is unnecessary.

PATTESON, J., COLERIDGE, J., and PLATT, B., concurred.

Conviction affirmed.

THE QUEEN *against* WILLIAM MATTHEWS AND ELLEN
MATTHEWS.

RECEIVERS—HUSBAND AND WIFE.

1850.

Saturday,
June 1.

“AT the last Epiphany Quarter Sessions, for the County of Stafford (*a*), Alexander Jameson, and Joseph Tomlinson, were charged with stealing a quantity of fowls, and William Matthews, and Ellen Matthews his wife, dealers in poultry, with receiving the same fowls, well knowing them to have been feloniously stolen.

“The indictment upon which they were severally charged, is in the words and form following, that is to say :—

“‘Staffordshire. The jurors for our lady the Queen, upon their oath present, that Alexander Jameson, late of the Parish of Norton Canes, in the County of Stafford, labourer; and Joseph Tomlinson, late of the same parish, labourer, on the seventeenth day of December, in the year of our Lord one thousand eight hundred and forty-nine, with force and arms at the parish aforesaid, in the county aforesaid, fifteen hen fowls, of the value of fifteen shillings, and one cock fowl of the value of two shillings, of the goods and chattels of one John Smith, then and there being found, feloniously did steal, take, and carry away, against the peace of our said lady the Queen her crown and dignity, and against the form of the statute in that case made and provided.’ Second Count. ‘And the jurors aforesaid, upon their oath aforesaid, do further present that William Matthews, late of the parish of Norton Canes, in the county of Stafford, labourer, and Ellen Matthews, wife of the said William Matthews, late of the same parish, labourer, after-

A wife cannot, jointly with her husband, be convicted of receiving stolen goods.

Where both found guilty on a joint indictment, the conviction of the husband affirmed; of the wife, quashed.

A prisoner admits having bought an article, which is subsequently found in his house. That is sufficient evidence for a jury to convict of receiving, without proof of an actual receipt, or that he had ever been at the house from before the purchase to the time of the charge.

(*a*) 31st December, 1849.

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wards, to wit, on the said seventeenth day of December, in the year last aforesaid, at the parish aforesaid, in the county aforesaid, the goods and chattels, in the first count mentioned as aforesaid, of the value aforesaid, so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have, they the said William Matthews and Ellen Matthews then and there well knowing the said goods and chattels, last aforesaid, to have been feloniously stolen, taken, and carried away, against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity.'

"*Mr. Vaughan* appeared as Counsel for the prosecution.

"*Mr. Kettle* as Counsel for the prisoners.

"The prisoners were all found guilty, and the question for the Court is, whether the receivers were properly convicted. The evidence against them was as follows:—

"Charles Welch, police-officer, went to Matthews's house on the twenty-second of December (the fowls were stolen on the seventeenth of December), saw Mrs. Matthews, asked her where all those fowls and geese came from. She said she bought part, and her husband some. She said her husband was not by when she bought them. She also said she bought hers from people who came to the house, and her husband bought his on Wednesday, at Shrewsbury-market. I asked her, if she had any unplucked; and she said, 'Yes, four up stairs.' I was going up, and she said, she had rather I did not, till her husband came. When Rofe, police-officer, came, we went up stairs, and found between twenty and thirty unplucked, and eleven plucked. Rofe and Woolley took the unplucked ones. I afterwards saw William Matthews at the police-station. He said he was not out of Walsall on Wednesday (Shrewsbury market-day). I know prisoners Jameson and Tomlinson; they live together; Tomlinson is a miner, and a brother of Mrs. Matthews.

“Cross-examined.—Tomlinson has a brother who lives one hundred or one hundred and fifty yards from him. He is a much larger man than the prisoner, five feet ten inches high.

“George Woolley, constable, Walsall, apprehended Tomlinson, and gave his shoes to Price (police-officer).

“William Price, police-officer. Found tracks of three persons, where fowls were stolen. One made by shoes of prisoner Tomlinson (shoes small, and nails remarkable, shown to jury).

“John Rofe, chief-constable of Walsall police (evidence same as Welch given above), and in addition produced some of the fowls from Matthews’s house, identified by prosecutor. Took William Matthews into custody at the Turk’s-head, Walsall. When at station-house, showed him fowls identified by prosecutor, and asked from whom he had them. He hesitated. Witness said, ‘We have got your wife’s brother, Tomlinson, in custody.—Did you not buy the fowls from him?’ He said, ‘I did.’ (N. B.—Rofe was reprimanded by the Court for asking this question.)

“In his summing up to the jury the Chairman said, ‘You observe, Ellen Matthews says her husband bought part of the fowls at Shrewsbury, and she bought part of them from people who came to the house, and that her husband was not by when she bought them. If you are of opinion that the female prisoner knowingly gave a false account of the way she received the fowls, you will have to consider how far such false account conveys the impression to your minds of her guilty knowledge. But if you should be of opinion that her statement is false, it can have no effect as against her husband, because he cannot be injured by a statement made by his wife in his absence. As regards William Matthews, Rofe says he told him he had Tomlinson in custody, and Matthews replied, ‘I bought the fowls from Tomlinson;’ and you are told Tomlinson is a miner, and

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brother-in-law of Matthews; and you will have to say by your verdict whether you are of opinion that William Matthews knew Tomlinson had stolen the fowls when he received them from him.’ ”

“ The above is the evidence and the summing up against the receivers.

“ Mr. *Kettle*, for the prisoners, submitted that the Chairman ought to direct the jury that, if they believed the wife received them in the absence of her husband, and without his knowledge, she alone should be found guilty. And as to the wife, they should not find her guilty, unless they believed she had received the fowls in the absence of her husband ; but it appeared from the evidence that the receiving by the two prisoners was at two different times, and it did not appear to the Court that one receiving only had been proved.

“ On the application of Mr. *Kettle*, for the prisoners, the judgment was postponed on William Matthews and Ellen Matthews ; and the question on which the opinion of her Majesty’s Judges is desired is, whether the above-mentioned directions suggested by Mr. *Kettle* ought to have been given to the jury in addition to what was stated by the Chairman in his summing up ? And whether upon the evidence as above stated, the receivers were properly convicted.

“ By the Court,

“ (Signed) HENRY HILL, Assistant Chairman.”

Kettle for the prisoner. [*Alderson*, B.—There is no case as against the wife of a joint receiving, and no evidence of a separate receiving by her.] As the jury have convicted both, thereby finding a joint act, such finding cannot now be separated by this Court ; it cannot take upon itself the duty of a jury, and say that the evidence supports the conviction of the

husband but not of the wife. The case was left to the jury as though there had been an admission by the wife and one also by the husband of a separate act. The objection he took was, that as both the charges were left to the jury, they may have believed either that the husband aided the wife, or that the wife aided the husband, and that the receiving was by the wife. [*Alderson*, B.—It does not appear that the fowls received by the wife were the prosecutor's fowls.] That was so. What he objected to was, that a case against the wife was presented to the jury, which may have influenced the entire verdict. There was no evidence of any joint act of receiving. As to the husband, there was no evidence against him; there was no proof of an actual receiving by him. [*Coleridge*, J.—It is shewn that they were in the prisoner's house, and that he bought them. Surely that is enough.] *Reg. v. Hill (a)*. The husband was not proved to have been at the house at any time when the fowls were there. [*Platt*, B.—If the man bought the fowls and they were taken to his house and left there, that is enough. There might have been some ground for your argument, if he had said he knew nothing about the fowls.]

Vaughan, for the Crown.—In support of the conviction of the wife;—there might have been a constructive receiving. [*Alderson*, B.—Not a joint receiving. If you go upon the receipt by the husband, you cannot have the wife also.] He referred to *Reg. v. Parr (b)*. [*Alderson*, B.—There was no evidence of any previous concert in this case. *Patteson*, J.—If the husband and wife received jointly, why do you convict the wife? *Reg. v. Parr* is the case of a servant.]

WILDE, C. J.—The conviction of the husband must be affirmed, and the conviction of the wife quashed.

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(a) 18 L. J. 199, M. C.; S. C., *supra*, p. 150. (b) 2 Moo. & R. 346.

CORAM

WILDE, C. J.,
ALDERSON, B.,

PATTESON, J.,
COLERIDGE, J.,

CRESSWELL, J.

THE QUEEN *against* WALTER WATTS.

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Saturday,
June 8. (a)

Case reserved by the Honourable Justice Cresswell.

LARCENY.

The prisoner was a shareholder in a public company, unincorporated, but authorized under the statute to sue or prosecute in the name of the treasurer; he was also a clerk to the company, appointed by the directors, who paid him his salary, and fixed the duties he had to perform. A

“THE prisoner was tried before me on the 10th of May, on an indictment of which the following is an abstract:—

“Walter Watts—That he on the 26th February, at St. Mary Woolnoth, in London, was clerk to George Carr Glyn, and, whilst he was such clerk, feloniously did steal one order for the payment of money, to wit, for the payment and of the value of 1400*l.* belonging to the said George Carr Glyn, his master.

“2nd count. Alleges that said prisoner was clerk to said George Carr Glyn, as, and then and there being, treasurer of the Globe Insurance Company, and that he

check had been drawn in the name of the company, paid by the bankers, and returned by them, in the course of business, through a messenger to the prisoner, whose duty it was to hold such returned check for the use of the directors. The prisoner purloined the check. Held, that he was properly convicted of *larceny*.

Held also, that he was properly convicted as *servant* to A. (the chairman of the directors), and others.

Where, according to the course of business, paid checks are returned by the bankers to the directors of a company, they become their property, as directors.

The prisoner, as a shareholder, had no property in such a check.

(a) This case stood on the list for Saturday, June 1st, and was on that day called on in its order. Alderson, B., observing several counsel to be present on each side, said, “It is understood in this Court, there is but one counsel heard on each side.” Justice Cresswell, who tried the case and reserved the question, not forming on that day one of the Court, although it was observed that Baron Alderson was present, who was acquainted with all the facts, Wilde, C.J., said, “The rule of this Court must be adhered to, that the Judge who tried the case must be present at the hearing on appeal.” The case was consequently adjourned to this day.

did steal one order, &c., belonging to the said George Carr Glyn as such treasurer.

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“3rd count. Alleges that the said prisoner was servant to Edward Goldsmid and others, and that he did steal one order, &c., belonging to them his said masters.

“4th count. Like third, only instead of alleging the order to belong to Goldsmid and others, alleges it to have been in their possession and power.

“5th and 6th counts. William Tite and others, instead of Goldsmid and others.

“7th and 8th counts. Embezzling the order the property of Glyn.

“9th count. Embezzling the order the property of Goldsmid and others.

“10th count. Embezzling 1400*l.* of Goldsmid and others his masters.

“11th count. Embezzling the order the property of Tite and others.

“12th and 13th counts. Stealing a piece of paper belonging to Glyn his master.

“14th count. Stealing a piece of paper the property of Goldsmid and others his masters.

“15th count. Stealing a piece of paper in the possession and power of Goldsmid and others his masters.

“16th count. Stealing a piece of paper the property of Tite and others his masters.

“17th count. Stealing a piece of paper in the possession and power of Tite and others his masters.

“18th, 19th, 20th, and 21st. Like 7th, 8th, 9th, and 11th, only embezzling a piece of paper instead of embezzling the order.

“22nd, 23rd, 24th, and 25th. Stealing an order for the payment of money the property of said persons, without alleging prisoner to be servant.

“26th, 27th, 28th, and 29th. Stealing a piece of paper

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the property of said persons without alleging prisoner to be servant.

“ It appeared that he had for many years been employed as a salaried clerk in the office of the Globe Insurance Company, and that he was also a shareholder in the concern. The affairs of the company, which is an unincorporated copartnership, are managed by a body of directors chosen out of the shareholders ; and at the time when the alleged offence was committed Edward Goldsmid was chairman, and William Tite deputy chairman of the directors, and George Carr Glyn was treasurer. The directors appoint and dismiss clerks and other servants, and fix their salaries, and the particular duties to be discharged by them, and the directors have the charge and custody of all books and papers belonging to the company. The salaries of the clerks are paid out of the funds of the company.

“ The company had a drawing account at the bank of Glyn and Co., and were in the habit of sending their pass book on Tuesday in every week to be written up, and their messenger went on the following morning to bring it back, when it was returned together with the checks and bills paid during the preceding week.

“ The prisoner was the person whose duty it was to receive the pass book and vouchers from the messenger, and it was his duty upon receiving them to compare the entries in the pass book with the books of the company, and to preserve the vouchers for the use of the company if wanted on any future occasion. On the 26th of February the prisoner paid into the London and Westminster Bank for his own account (which he kept there) a check for 1400*l.* purporting to be drawn by the Globe Insurance Company on Glyn and Co. It was cashed by Glyn and Co., together with other checks for the London and Westminster Bank, entered to the debit of the Globe Insurance Company in their pass book, and delivered together with the book on

the following morning to the messenger of the company, who delivered the book and check to the prisoner in the usual way. On the 4th of March, in consequence of some suspicion attaching to the prisoner, a search for the check for 1400*l.* was made during his absence amongst the vouchers in his keeping, and it could not be found; his papers were then sealed up, and he, on finding that such a step was taken, said he would not remain there and quitted the office.

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“The pass book was examined, and there the entry of the check for 1400*l.* had been erased, and the check was never found.

“There was no evidence to show that any person on behalf of the Company had ever drawn the check in question, or that it had been drawn upon paper stolen from the Company.

“Upon this state of facts it was contended by the prisoner's Counsel, that there was no evidence of any property in any of the parties from whom the check was alleged to have been stolen, except as shareholders; and that the prisoner, being also a shareholder, could not be indicted for stealing the property of which he was a joint owner. That the Statute 47 Geo. III. c. 30—whereby it was enacted, ‘That all actions and suits to be commenced or instituted by or on behalf of the said society or partnership, against any person or persons, or body or bodies, politic or corporate, shall, or lawfully may be, commenced or instituted and prosecuted in the name or names of the treasurer or treasurers for the time being of the said society or partnership, as the nominal plaintiff or plaintiffs for and on behalf of the said society or partnership, and that all prosecutions to be brought or instituted by or on behalf of the said society or partnership, for fraud upon or against, or for embezzlement, robbery of, or stealing the property of the said society or partnership, or for any other

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offence committed against or with intent to injure or defraud the said society or partnership, shall or lawfully may be so brought or instituted and carried on in the name or names of the treasurer or treasurers for the time being of the said society or partnership, and in all indictments and informations it shall be lawful to state the property of the said society or partnership to be the property of the treasurer or treasurers for the time being of the said society or partnership, and any offence committed with intent to injure or defraud the said society or partnership shall and lawfully may in such prosecution be laid to have been committed with intent to injure or defraud the said treasurer or treasurers for the time being of the said society or partnership, and any offender or offenders may thereupon be lawfully convicted of any such offence, and the death, resignation, or removal, or other act of such treasurer or treasurers, shall not abate any such action, suit, or prosecution'—made the treasurer the representative of all the shareholders, and therefore of the prisoner as well as others, and did not alter the case.

“I thought that the charge of embezzlement and of stealing an order for the payment of money failed ; but in order to obtain the opinion of this Court, with regard to the charge of stealing a piece of paper, I told the jury that if the cancelled check was returned to the prisoner, and he received it in the usual manner, to be kept by him for the use of the directors, and afterwards abstracted or destroyed it, they should find him guilty.

“The jury found him guilty of stealing a piece of paper, and I have to request the opinion of this Court whether my direction was right or not.”

Cockburn, Q. C. (with him *Bramwell*) for the prisoner.—He might assume, in the first instance, there was no evidence of any stealing on the part of the prisoner. He was

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proceeding to observe on the facts which did not appear in the case reserved. [*Alderson*, B.—You must treat this case as if you were, in effect, moving for a new trial on the ground of misdirection (a).] He would confine himself to the case. This was not a case of larceny; it was embezzlement, upon the ground that the paper never came to the possession of the prisoner's masters before the prisoner committed the act. The course of business was this—the directors of the Globe Insurance Company kept a banking account with Glyn and Co.; the company drew checks upon the bank as it became necessary, and they had a pass-book, which they sent to the bankers for, on the Wednesday of every week, when the book was given by the bankers to the messenger, together with the checks which had been honoured, and which he in the course of his business took to the prisoner. Amongst these documents was the paper in question, which never went into the hands of the masters at all. This case was precisely like *Reg. v. Masters* (b). There the money never went into the hands of the master, but was, at the time it was taken in the course of passage, and for that purpose was received by the servant. Here the facts were precisely the same; the paper never was in the hands of the master. Suppose the messenger to have taken the paper, that would have been a clear case of embezzlement, because the property had never passed into the possession of the master; possession by him could not have been said to be possession by the master. So, giving it over to another person to transmit would not be vesting a possession in the master? he merely received it as a servant. [*Coleridge*, J.—The case finds that it was the duty of the messenger to carry it

(a) *Cockburn*, having remarked upon an omission in the case, *Cresswell*, J., said, "We cannot go into that now; if you were dissatisfied with the case you should have applied to me to amend it."

(b) *Ante*, p. 1.

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for the company. Suppose my butler puts plate into a chest of mine of which he keeps the key, and afterwards purloins it?] That is not like this case. [*Coleridge, J.*—Suppose it to be a new piece of plate, which has been given by the servant to the butler, and never has been put into the chest?] If the butler met the servant with it in the street, and received it from him, and appropriated it to his own use, that, as against the master would be embezzlement. [*Coleridge, J.*—It was part of the duty of the servant to hand it over to his employers.] It was left in his hands to be produced at any time when the company might call upon him to do so. [*Wilde, C. J.*—In the office.] Supposing him to have had a desk of his own, under his sole control, independent of the master, in which it was placed; in such case it would be embezzlement. There was nothing to show that, immediately upon receiving it from the messenger, he did not put it into his pocket, or destroy it; in either of those cases it would be embezzlement. There was no evidence beyond the fact that the checks were put into the hands of the prisoner by the messenger, and were to be kept by the prisoner as a part of his duty. There was never a complete possession in the master. [*Alderson, B.*—How is this case distinguishable from *Rex v. Murray (a)*?] In that case the money proceeded from the master. [*Alderson, B.*—You say, that in *Murray's case* it was received from the master by or through another servant. *Patteson, J.*—If Glyn had been one of the company, and had paid the check, and

(a) 1 Moo. C. C. 276. In this case, the prisoner was indicted for embezzlement. It was proved that he was a clerk of A.; that he received from another clerk 3*l.* of A.'s money, in order that he might pay (amongst other things) for inserting an advertisement in the Gazette: he paid 10*s.* for the insertion, and charged A. with 20*s.* for the same, fraudulently keeping back the difference, which he converted to his own use. All the Judges held this not to be within the statute 7 & 8 Geo. IV. c. 29, s. 47 *; because A. had had possession of the money by the hands of his other clerk.

* Section of statute relating to embezzlement by clerks.

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it was in his possession, was it not in the hands of the company by him?] Here the paper never had been reduced into possession, on the part of the master, at any previous stage of the proceedings, unless it could be said that a delivery to the prisoner constituted a delivery to the master. That was the whole question. If it did not, it was not larceny. The only possession of the master was the possession by the servant, and if he received it on account of the master, it is the every-day case of embezzlement. Suppose the messenger had handed it over to a stranger to deliver to the master, which he had promised to do, and he had purloined it, that would not have been a larceny. [*Alderson*, B.—Suppose this to have been a letter delivered to the prisoner to hand over to his master, and he, from some suspicion of its contents, or otherwise, had burned or in some way destroyed it, would that have been larceny? In whom was the property when the check was at Glyn's?] He apprehended it was the property of the banker. The banker was not bound to give it up. Some bankers retain them. [*Wilde*, C. J.—Is it not considered the property of the drawer when it is paid?] It stood precisely upon the same footing as a bill of exchange, which an acceptor might keep after he had paid it; so might the payer of a check. It is the banker's only discharge as against any action which might be brought against him for the amount. It is, in fact, equivalent to a bill of exchange. [*Alderson*, B.—When in the banker's hands was it not the property of the master?] That certainly was not so; the practice with many bankers went to show it was otherwise. Drummonds give them up when the customer signs the book; Childs will not give them up at all; and Coutts's only do so sometimes, as a matter of favour: besides, whatever force there might be in the observation, it could only apply in reference to a genuine check drawn upon the banker; here there was no evidence of any

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genuine instrument. [*Alderson*, B.—Suppose he had forged the check, sent for it from the bankers, and had obtained it, and burned it, could it be said to have been in the possession of the master? *Wilde*, C. J.—Could you not maintain trespass or trover (a)?] So you might have done in *Reg. v. Masters*. It was not shown that the paper had been at any time the property of the master. The whole case rests upon its being delivered to the prisoner by a servant of the company, whose duty it was to deliver it to him, and who had received it from a third person. There was no evidence that the master had even a constructive possession. The only evidence of the prisoner having committed any offence, was that he ought to have put the paper into a certain receptacle, because in the course of business the company would go there to look for it; that it was looked for, but was not found. The presumption therefore is, that as soon as he got the check back, he destroyed it, and put it in no place of deposit at all.

The next question was, whether, looking at the position the prisoner stood in with reference to the company, he could be guilty of larceny. It was true, he was a servant of the company. The company consisted of a number of shareholders, not incorporated, but authorized under the statute (b), to sue in the name of the treasurer, and in all prosecutions to prosecute in the name of the treasurer. For all other purposes, the Act provides that they are to have all the common incidents of an ordinary partnership. The prisoner, although employed as a clerk, at a salary, was a shareholder of the company, and, consequently, a partner; and, under these circumstances, could not be convicted of larceny. Some of the shareholders were constituted directors, and these were divided into various separate committees; one of these committees was for managing general matters of bu-

(a) *Vide supra*, p. 17, *per Williams*, J.

(b) 47 Geo. III. c. xxx. (local and personal), s. 1; see case stated.

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siness ; others, for other affairs of the company, and by one of these committees was the prisoner appointed ; and the prisoner, although a clerk, had, with the others, a common interest in the concern. These committees were mere temporary arrangements, which might at any time be put an end to. The prisoner therefore could not be convicted of larceny, with respect to his own property, under such circumstances. He was aware there had been cases decided, that where a man has a joint property, and takes it *animo furandi*, out of the possession of another, who has a special property therein, he may be indicted ; but those are all cases where the party has not a present right to the possession : that was not the case here : here the prisoner had a present right of possession ; he was not liable to give it up until called upon to do so ; until then he was to keep it. The prisoner might have been guilty of a breach of duty, if, when called upon, he had neglected to give it up ; but here, at the time the prisoner had the property, he had the possession, and he had also the right to the possession, and there was no case that went the length to say that under such circumstances a man could be convicted of larceny ; that could only be where the man obtained the possession *animo furandi*. [*Patteson, J.*—If any of the other shareholders had stolen it from him, they might have been guilty of larceny.] Yes ; because the prisoner had a special property in the article : but a man cannot be found guilty of stealing from himself the property of which he had the possession, and also the right of possession. He referred to Russel on Crimes (a).

There was one other point : he was charged as being the servant of the directors, and not of the shareholders. [*Coleridge, J.*—He is not so charged in the counts under our consideration. *Cresswell, J.*—He is not called the servant of the company ; he is called the servant of Gold-

(a) Vol. II. p. 87, 88.

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smid, and others.] And others,—meaning the other shareholders; then he was indicted as being the servant of himself. It was clear, upon the facts, that he was not the servant of the treasurer. Upon these points the conviction could not be sustained, and the prisoner must be acquitted.

Attorney-General (with him *Clarkson*), in support of the conviction.—This case came before the Court in the nature of a new trial, or more properly as on a bill of exceptions, and therefore both sides must be taken to be bound by the case as it was submitted. He assumed he had to answer three points made for the prisoner.

1st. That the case stated for this Court was one of embezzlement, and not larceny.

2ndly. That the prisoner was a partner, and therefore could not, under the circumstances, be guilty of larceny.

3rdly. That he was not a servant, as laid in the indictment. This objection went to the degree of offence only.

The first point to be considered is, whether the ruling of his Lordship was right or wrong. It is contended that the prisoner, having had the cancelled check returned to him, and having received it in the course of business for the use of the directors, and having afterwards destroyed it, it is embezzlement and not larceny: because, although the check was returned by the bankers, there never was any possession in the master, the check being *in transitu*. He thought *Reg. v. Murray*, when considered, was an authority for this indictment. The point put by *Alderson*, B., of a letter having been sent by the bankers for the directors, seemed to him not in point, for there the property never had been the property of the company. The bankers, in this case, made the party an agent for the delivery. Suppose he sent his clerk to a law booksellers to buy a book for him; that the clerk did buy it, and then gave it to the laundress to give to him; in such case the clerk had attorned to him by the laundress: surely, if the laundress

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stole that book, it would be larceny. That is, in principle, precisely *Murray's case*. It was immaterial what was the practice in other banking-houses; according to the practice of dealing between the bankers and this company, the bankers returned the vouchers to the company. *Reg. v. Masters* is distinguishable from this case, inasmuch as here the party received the paper to hold for his master; in *Reg. v. Masters* it was said to be *in transitu*. [*Cresswell, J.*—In *Reg. v. Masters*, it was money passing from one servant to another, whose duty it was to pay it to a third servant: it was not the duty of any one to hand over to the master the identical coins.] Here the messenger was sent by the company for the check, and it was returned to the prisoner, and received by him, to be kept for the directors. So far as the question of property is concerned, *Reg. v. Murray* is an express authority. “The prisoner was the person whose duty it was to receive the pass-book and vouchers from the messenger; and it was his duty, upon receiving them, to compare the entries in the pass-book with the books of the company, and to preserve the vouchers for the use of the company.” Here the duty having been performed, and the bailment at an end, he afterwards abstracted or destroyed the check. If he had merely received the paper, it might have been embezzlement; but if he has fully performed his duty in reference to it, the bailment is at an end; and if any subsequent abstraction takes place, that is a larceny. [*Cresswell, J.*—I think you are assuming too much in saying the prisoner had discharged his duty in reference to this check: he was to receive the vouchers, and to see that the amount was properly entered in the pass-book. *Wilde, C. J.*—If he had a duty to discharge, it is to be presumed that he performed that duty.] When the discovery was afterwards made the property was in the company; first by the delivery to the messenger on behalf of the company, and then by being deposited by him in the hands of the

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prisoner, who it must be presumed had performed his duty, and deposited the check in the place appointed by the company. Then it was said that if the property was in any one at the time, it was in the bankers, and not in the company; but that is answered by the case itself. It was delivered with the book to the messenger of the company, who delivered the book and check to the prisoner in the usual way; that was, to be preserved for the use of the company. [*Cresswell*, J.—In this case there was an absence of proof whether this check had, or had not, been drawn by the company, and there was evidence that they had the means of showing that fact. There was no evidence to show that when this check went into the hands of Glyn and Co. it ever had been the property of the company; the only evidence was that it was drawn in the form in which the checks of the company were drawn.] There were several leaves missing out of the check-book, but it could not be proved that this was one of them. The bankers received and honoured it as the check of the company, and it was delivered by the bankers to the messenger as the property of the company; and by that act, (no other person claiming it,) became the property of the company.

It was then said that a man could not be a servant to himself. In *Reg. v. Hall (a)*, “It is embezzlement in a member of, and secretary to, a society, fraudulently to withhold money received from a member to be paid over to the trustees; and he may be stated to be the clerk and servant of the trustees, and the money may be properly stated to be their property, though the society be not enrolled, and though the money ought in the ordinary course to have been received by a steward. [*Wilde*, C. J.—Is that under an act which vests the money in the hands of the trustees?] Yes. [*Coleridge*, J.—The clerk in that case was not a co-trustee. *Cresswell*, J.—Nor a co-

(a) 1 Moo. C. C. 474; see *Reg. v. Atkinson*, 1 Car. & M. 525.

owner.] If a man be a member of a company, he may delegate to others the property in any article, and by feloniously depriving them of it, be guilty of a larceny of his own goods. If a man bails an article, his property, he may be guilty of larceny if he steals it from the bailee, upon the principle that the custody of property, involving responsibility, is equivalent to the possession. If a man rides away a horse, of which he is part owner, when it is in the custody of the other, he is guilty of larceny, if he feloniously takes it from the possession of the bailee. The act (a) says, "If any clerk or servant shall steal any chattel, money, or valuable security belonging to, or in the possession or power of his master;" so that the act draws the distinction between belonging to and being in the possession of, or power of the master. It is unimportant, therefore, whether the prisoner had the property equally with directors; they had the custody of the document which belonged to them. [*Wilde*, C. J.—To bring it within that section, you must make out that they were his masters.] In *Reg. v. Jenson* (b), the prisoner, a clerk to a savings-bank, was indicted for embezzlement, and it was held that he was properly described as a clerk to the trustees, though elected by the managers. [*Patteson*, J.—It does not appear he was a member there.] No, he was simply a clerk: in *Reg. v. Hall* it appeared that he was. [*Patteson*, J.—The point was not taken there.] *Reg. v. Miller* (c). What was there in this case to prevent the prisoner, though a member, from being liable to a prosecution under the circumstances? He was appointed by the directors, who had the hiring of servants, and the fixing of the amount of salary; although it is true that the amount is paid out of the joint fund.

It is then said that he was not a servant. He thought

(a) 7 & 8 Geo. IV. c. 29, s. 46.

(b) 1 Moo. C. C. 434.

(c) 2 Moo. C. C. 249.

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that had been settled at the trial; the jury found him guilty as servant. [*Cresswell*, J.—I do not know that.] It comes to a question of fact, and his learned friend must lay it down as a rule that a man can never be a servant to himself and others. Cannot a man submit himself to the orders of the directors of a company, of which he is himself a member, upon condition that he shall receive a salary? [*Wilde*, C. J.—Whom would he sue for his salary?] Those who appointed him. [*Cresswell*, J.—The case was put for the purpose of raising the question. He was paid out of the funds of the company. *Wilde*, C. J.—The case finds that he was employed as a salaried clerk.] Yes, and that the directors paid him; and if he had no pay at all he might still be their servant: there were numberless servants who were not paid at all, but who really paid for the appointment. He then referred to the statute as set out in the case. [*Patteson*, J.—It is the property not of the directors but of the society.] If so, then it may be laid as the property of the treasurer. [*Patteson*, J.—No doubt; but can it be as against a member of the company?] He apprehended it might. Sect. 3 (a) did not appear to affect the question at all; he therefore apprehended that, upon the whole, he was entitled to the judgment of the Court.

Cockburn, Q. C. (in reply.) He was not moved from his position by any of the arguments which had been adduced. He would say nothing more about embezzlement, but in reference to *Reg. v. Murray*, cited on the other side, there the money must be taken to have been the property of the

(a) 47 Geo. III. c. xxx. (local and personal), s. 2. Nothing herein contained shall extend, or be deemed, construed, or taken to extend to incorporate the said society or partnership, or any of the members thereof, or subscribers thereto respectively, from any responsibility, contracts, duties, or obligations whatsoever, which, by law, they may now, or at any time hereafter, be subject or liable to, either as between such society or partnership and others, or between the, or any of the, individual members of such society or partnership and others, or among themselves, or in any other manner whatsoever.

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master, it is quite consistent with that case that it was so ; it indeed proceeds upon the fact that it was the property of the master. In *Reg. v. Masters*, which is distinguishable from that case, the first person received it from a stranger, and it never had been the property, or in the possession, of the master. In the one case the money was proceeding from the master, in the other case to the master. That is the whole doctrine of embezzlement, as distinguished from larceny. [*Alderson*, B.—When the money can come to the master only by the hands of the servant who has the money, and does not hand it over, it is embezzlement.] *Reg. v. Masters* establishes, that where the money passes through several hands to the master, it is the same in each hand as in the hands of the first receiver. Here it was delivered to the prisoner that he might pass it on to the directors, and it never had reached their possession, and therefore there was no larceny. It is the common case of embezzlement. Had it been money no person could have had the slightest hesitation in saying that it was embezzlement, and the fact of its being a piece of paper could make no difference. The statute does not say you may lay the property in the treasurer, it does not mean to alter the relation of the parties. Suppose this to have been done openly, who could have brought an action of trover ? In all the other cases trover might have been maintained. [*Wilde*, C. J.—Then any one shareholder might go into the office, take property, and walk away with it ?] Certainly, but for the possession. He therefore submitted, first, that there was no larceny, because the article never came to the possession of the master ; secondly, that he was part owner, and at the time had the lawful possession of the document ; and thirdly, that he was not a servant as laid in the indictment.

WILDE, C. J. (*a*) delivered the judgment of the Court as

(*a*) On Saturday, June 22, 1850 : Present—Wilde, C. J. ; Alderson, B. ; Patteson, J. ; Coleridge, J. ; and Platt, B.

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follows :— We have considered this case, and are all of opinion that the counts in the indictment, which charge the stealing a piece of paper, the property of Goldsmid and others the masters of the prisoner, are supported by the evidence.

By the statement of the case, it appears that Goldsmid and others are the directors of the company, and that by its constitution they have the appointment and dismissal of the servants in the employ of the society, that they fix and pay their salaries, and also fix the duties they are to perform. The prisoner was a salaried clerk in the office, and therefore he was their servant.

They have also the ultimate charge and custody of the documents of the company, and by the course of business between the company and its bankers, the paid checks were returned to the directors, were part of the company's documents, and became the vouchers of the directors and their property as such directors. The paper in question was one of these.

One of the prisoner's appointed duties was to receive and keep for his employers such returned checks. Any such paper therefore in his custody would be in the possession of his employers. The paper in question, therefore, as soon as it had passed from the hands of the messenger and arrived at its ultimate destination, the custody of the prisoner for the directors, was really in their possession; and when he afterwards abstracted it, for a fraudulent purpose, he was guilty of stealing it from them: as a butler who has the keeping of his master's plate would be guilty of larceny if he should receive plate from the silversmith for his master, at his master's house, and afterwards convert it to his own use, before it had in any other way, than by his act of receiving, come to the actual possession of the master. This case is distinguishable from those in which the goods have only been in the course of passing towards

the master, as in *Reg. v. Masters* (18 L. J., M. C. 2 (a)), where the prisoner's duty was only to receive the money from one fellow-servant and pass it on to another who was the ultimate accountant to the master. Here the paper had reached its ultimate destination when it came to the prisoner's keeping, and that keeping being for his masters made his possession theirs.

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In this view of the case no difficulty arises as to part ownership from the fact that the prisoner was a shareholder in the company. As such he had no property in this paper.

(a) See *S. C.*, *supra*, p. 1.

MICHAELMAS TERM,

IN

THE FOURTEENTH YEAR OF THE REIGN OF VICTORIA.

CORAM

POLLOCK, C. B.,
WIGHTMAN, J.

WILLIAMS, J.
TALFOURD, J.

MARTIN, B.

THE QUEEN *against* HENRY CRADDOCK.

ARREST OF JUDGMENT.

1850.
Wednesday,
Nov. 20.

“ NORTHUMBERLAND.—At the General Quarter Sessions of the Peace of our Lady the Queen, held at Hexham, in and for the said county, on Wednesday the 3rd day of July, in the 14th year of the reign of our Sovereign Lady Victoria, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith ; before Her Majesty’s Justices of the Peace assigned to keep the peace of the said county :—Henry Craddock was tried upon an indictment of which the following is a copy.

“ Northumberland, to wit.—The jurors of our Lady the Queen upon their oath, present that Henry Craddock, late of the parish of Alnwick, in the county of Northumberland, labourer, on the 13th day of May, in the year of our Lord

Where a prisoner was indicted for stealing certain goods, and in a subsequent count for receiving the said goods “ *so as aforesaid feloniously stolen,*” &c. ; and the jury acquitted of the stealing and convicted of the receiving, the conviction was affirmed upon a case reserved upon a motion in *arrest of judgment.*

Where the receiving is so laid, the Judge should direct the Jury to acquit upon the count for receiving, if they should not find the prisoner guilty of stealing.

Qy. Whether the words “ *so as aforesaid feloniously stolen*” necessarily mean that the goods were stolen by the person in the preceding count mentioned.

1850. 1850, at the parish aforesaid, in the county aforesaid, one
REG. v. promissory note for the payment of 10*l.*, and of the value of
CRADDOCK. 10*l.*, and one piece of paper of the value of one penny,
of the property, goods, and chattels of Robert Harvey,
from the person of the said Robert Harvey, the said sum
of 10*l.*, secured and payable by and upon the said promissory
note, being then and there due and unsatisfied to the
said Robert Harvey, then and there feloniously did steal,
take, and carry away against the form of the statute in that
case made and provided, and against the peace of our Lady
the Queen, her crown, and dignity.

“ Second count: and the jurors aforesaid upon their oath
aforesaid do further present that Henry Craddock, late of
the parish aforesaid in the county aforesaid, labourer, on
the day and year aforesaid, at the parish aforesaid in the
county aforesaid, one bank note for the payment of 10*l.*,
and of the value of 10*l.*, and one piece of paper of the value
of one penny, of the property, goods, and chattels of Robert
Harvey, from the person of the said Robert Harvey, the
said sum of 10*l.* secured and payable by and upon the said
bank note, being then and there due and unsatisfied to the
said Robert Harvey, then and there feloniously did steal,
take and carry away against the form of the statute in that
case made and provided, and against the peace of our Lady
the Queen, her crown and dignity.

“ Third count: And the jurors aforesaid upon their oath
aforesaid do further present, that Henry Craddock, late of
the parish aforesaid in the county aforesaid, on the day and
year aforesaid, at the parish aforesaid in the county afore-
said, the goods and chattels aforesaid, so as aforesaid felo-
niously stolen, taken and carried away, feloniously did
receive and have then and there, well knowing the said
goods and chattels last aforesaid to have been feloniously
stolen, taken, and carried away against the form of the

statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

“DICKSON.”

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The jury found the prisoner Not Guilty upon the first and second counts, but Guilty of receiving under the third count.

Upon this the Counsel for the prisoner moved in arrest of judgment, because the jury had acquitted the prisoner of the stealing, and in the said last count it is stated that the prisoner did receive the same goods and chattels “*so as aforesaid feloniously stolen*,” whereas the jury having found that he had not stolen the same they could not under the third count as it is worded find him guilty of receiving the goods so alleged to be stolen by him.

The Counsel for the prosecution contended that the words “so as aforesaid” in the count for receiving might be struck out as surplusage, which the Court refused to do.

The Court, however, granted a case for the opinion of the Justices of either Bench and the Barons of the Exchequer, under the statute.

The Court postponed judgment, and the prisoner was committed to the common gaol of the county until the decision of the Judges be received unless he should find bail himself in 40*l.*, and two sureties in 20*l.* each before the rising of the Court or at any adjournment thereof, which he has not yet done.

The question for the opinion of the Court is, Whether the prisoner is properly found guilty under the count for receiving as set forth in the indictment.

“CHARLES ATT. MONCK,
“Chairman of Quarter Sessions for the
county of Northumberland.”

Otter, for the prisoner.—This case turned upon the

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CRADDOCK.

construction to be put upon the words “so as aforesaid.” He should say that they meant that the goods in the first and second counts had been stolen, taken, and carried away by Henry Craddock, as in those counts mentioned. The words were descriptive of the person, and the prisoner having been acquitted of the stealing was entitled to be acquitted altogether (a). *Reg. v. Woolford* (b) was precisely in point; but it would be said that an alteration had been made by the statute 11 & 12 Vict. c. 46; he would however submit that that statute made no alteration in the offence or in the mode of pleading. The statute was intended to remedy a defect in the law in consequence of the escape of prisoners in such cases as in *Rex v. Galloway* (c), and *Rex v. Madden* (d). In the statute 11 & 12 Vict. c. 46, s. 3, the word “felonious” is used when applied to receiving, and in some instances it is omitted when applied to the stealing; but the statute must mean in all cases “feloniously stolen,” as appears upon reference to the statute 7 & 8 Geo. IV. c. 29, s. 55. It might have been sufficient if the third count had simply stated the goods to have been feloniously stolen, but the stealing is limited by words of description to a particular stealing—a stealing “so as aforesaid.” In all the precedents, and in all the text writers it has been the custom to make this distinction in the form of the indictment:—where the principal and receiver are indicted jointly the receiver is charged with receiving the goods and chattels “so as *aforesaid* feloniously stolen,” &c., but in a substantive felony

(a) See *Ex parte Palmer*, 6 C. & P. 122.

(b) 1 Moo. & R. 384: marginal note—“In an indictment for receiving stolen goods, knowing them to have been stolen by a person named, the stealing by that person must be proved, or the receiver must be acquitted.”

(c) 1 M. C. C. 234, in which case the Judges (before the statute) determined that a party ought not to be indicted both as a principal and as a receiver.

(d) 1 M. C. C. 277, confirming *Rex v. Galloway*.

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the allegation is "goods and chattels before then feloniously stolen did receive," without stating by whom the felony was committed. The words "so as aforesaid" draw after them the description of the manner of stealing, and the person by whom the goods were stolen. [*Martin, B.*—Is this in the nature of a motion in arrest of judgment?] Yes. [*Martin, B.*—*Reg. v. Woolford* was upon a variance, and not in arrest of judgment. Suppose two counts in an indictment, identically the same, and the prisoner is found guilty upon the one and not guilty upon the other, could the judgment be arrested?] No jury would so stultify themselves. Suppose the indictment to have charged the prisoner with receiving a note stolen by A., it could not be given in evidence that he had received a note stolen by B. Under the statute the addition of a count for receiving is allowed only where the goods are the same. Upon the record this inconsistency would appear, that the prisoner was acquitted of stealing certain goods, and then convicted of receiving those goods so stolen by himself. Where a party is charged with stealing a *black* horse, although the word "*black*" is immaterial, still, if it be alleged it must be proved. [*Williams, J.*—This being a motion in arrest of judgment you must take it that all the counts are proved. *Pollock, C. B.*—It is extreme nonsense, no doubt, but the objection is purely technical and it is met by technicality.] Then the Court will overrule *Reg. v. Woolford*. [*Pollock, C. B.*—Not at all; that case was not after verdict. In this case the Judge at the trial ought to have directed the jury to acquit upon the third count if they acquitted upon the other two, but that is not the point before us. The question before us is whether this judgment ought to be arrested; that is a mere dry question of pleading. *Williams, J.*—What is the objection to interpreting the words "so as aforesaid"

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to mean, “as I said before”?—*Pollock*, C. B.—Some of the Court are of opinion that the words do not necessarily mean that which is attached to them for the purpose of raising this objection.]

Liddle, for the Crown, was not called upon.

Pollock, C. B.—The conviction must be affirmed.

SITTINGS AFTER MICHAELMAS TERM.

IN

THE FOURTEENTH YEAR OF THE REIGN OF VICTORIA.

CORAM

LORD CAMPBELL, C. J.,
 PARKE, B.,
 ALDERSON, B.,
 PATTESON, J.,
 COLERIDGE, J.,
 MAULE, J.,

CRESSWELL, J.,
 ERLE, J.,
 PLATT, B.,
 WILLIAMS, J.,
 TALFOURD, J.,
 MARTIN, B.

THE QUEEN v. JOHN WILEY.

RECEIVER.

1850.
Tuesday,
Nov. 26 (a).

“ At the General Quarter Sessions of the Peace for the county of Northumberland, holden by adjournment at the Moot Hall of the said county, in the Castle of Newcastle-upon-Tyne, in the same county, on the 26th day of February, in the year of our Lord one thousand eight hundred and fifty, Bryan Straughan, George Williamson, and John Wiley were jointly indicted for stealing and receiving five

Two persons stole some fowls, and carried them in a sack, at half-past four o'clock, A.M. to the house of A.'s father. A. (a higgler) admitted the thieves into the house, and

shortly afterwards carried a lighted candle and conducted them to a stable (at the back of the house and belonging thereto) where one of the thieves who had carried the sack placed it on the floor. The mouth of the sack was tied. The three stood round the sack as if bargaining. Held, that upon these facts A. could not be convicted of receiving, by *Parke, B., Alderson, B., Patteson, J., Coleridge, J., Maule, J., Platt, B., Talfourd, J., and Martin, B.*; dissenting, Lord Campbell, C. J., Cresswell, J., Erle, J., and Williams, J.

(a) This case had been previously argued, in Easter Term last, on April 27th, before Lord Campbell, C. J., Parke, B., Alderson, B., Cresswell, J., and Erle, J.

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hens and two cocks, the property of Thomas Davison. It was proved that on the morning of the 28th day of January in the same year, about half-past four, Straughan and Williamson were seen to go into the house of John Wiley's father with a loaded sack that was carried by Straughan. John Wiley lived with his father in the said house, and was a higgler attending markets with a horse and cart. Straughan and Williamson remained in the house about ten minutes, and then were seen to come out of the back door preceded by John Wiley with a candle, Straughan again carrying the sack on his shoulders, and to go into a stable belonging to the same house situated in an enclosed yard at the back of the house, the house and stable being on the same premises. The stable door was shut by one of them, and on the policemen going in they found the sack lying on the floor tied at the mouth, and the three men standing round it as if they were bargaining, but no words were heard. The sack had a hole in it through which poultry feathers were protruding. The bag when opened was found to contain six hens, two cocks, and nine live ducks. There were none of the inhabitants up in the house but John Wiley, and on being charged with receiving the poultry knowing it to be stolen he said that 'he did not think he would have bought the hens.'

"The jury found Straughan and Williamson guilty of stealing the poultry laid in the indictment, and John Wiley guilty of receiving the same knowing it to be stolen.

"The Bench told the jury that the taking of Straughan and Williamson with the stolen goods as above by Wiley into the stable over which he had control, for the purpose of negotiating about the buying of them, he well knowing the goods to have been stolen, was a receiving of the goods by him within the meaning of the statute.

"The question for the opinion of the Court is, If the conviction of Wiley is proper.

“The three prisoners were again jointly indicted for stealing and receiving the nine ducks which were found in the sack mentioned in the last case, and upon the same evidence and the same direction by the Bench. The jury again found Straughan and Williamson guilty of stealing, and John Wiley guilty of receiving the nine ducks, knowing them to have been stolen. The question for the opinion of the Court is, Whether this second conviction is proper.

(Signed) . CHARLES ATT. MONCK,
 “Chairman of the Court of Quarter Sessions
 for Northumberland.”

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 WILEY.

Otter, for the prisoner.—Was this a receiving within the meaning of the statute 3 W. & M. c. 9? From the stat. 5 Anne, c. 31, down to 22 Geo. III. c. 58, there were many statutes against buyers and receivers. In all those statutes the words “buy *and* receive” were used. The subsequent statute 7 & 8 Geo. IV. c. 29, under which this indictment was laid, repeals the stat. 22 Geo. III. and makes it an offence to “receive” stolen goods, omitting the word “buy,” and therefore it appears that buying without receiving is not an offence under that statute. If that be so, the fact of taking the party into the stable with an intent to buy is no offence. Upon the meaning of the word “receive” in that stat. (the 7 & 8 Geo. IV. c. 29, s. 54,) this case depended. How did the parties at the time stand in relation to the stolen articles. It was quite clear that the right of property remained in the party from whom it was stolen. The thieves had the actual possession, and nothing more; there is no evidence that that passed from them. He cited, *Fyson v. Chambers* (a), and *Armory v. Delamirie* (b), to show that where the party has the right to an actual possession, originally

(a) 9 M. & W. 460.

(b) 1 Stra. 505.

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obtained, not by unlawful means, he may maintain trover, but it was very different where the possession was obtained by unlawful means ; there trover by the party so possessed would not lie, there being no ownership in him. In order to create a possession in the receiver there must be a willing parting with the possession by the holder, and on the part of the receiver there must be a willing taking. [Lord Campbell, C. J.—May there not be a joint possession in the receiver and in the thief.] In this case he thought there could not be ; possession by the thieves was antagonistic to possession by the receiver. In order to constitute a receiving there must be a person parting with the property and another receiving it. If one man were to say to another, I have a watch hidden under such a tree, and the other were upon this to go and take it, it could not be said that that was a receiving, because it was taken against the will of the party having the possession ; *Reg. v. Wade (a)*. A man cannot be said to receive that which he steals. Nor will a constructive possession be sufficient ; the party must have actually received the goods into his possession ; *Reg. v. Hill (b)*. [Lord Campbell, C. J.—That case goes to show that an actual or potential receiving is sufficient. Maule, J.—What is “potential” ?] He apprehended it meant having a disposing power over the property. If *potential* is to mean *constructive* possession, *Reg. v. Hill* is wrongly decided ; for the party to whom goods are forwarded has, whilst the goods are *in transitu*, a constructive possession. [Alderson, B.—That doctrine does not apply in criminal cases (c). Lord Campbell, C. J.—Suppose the thief and the receiver to have both of them at the time the

(a) 1 Car. & K. 739.

(b) 1 Den. C. C. 453, *ante*, p. 150.(c) In civil cases, the law implies a *lawful* possession, although there may not be an actual receipt. In criminal cases, the *lawful* possession cannot be implied ; the charge is of an *unlawful* possession.

actual manual possession, will that do? May there not be a receiving although the thief is jointly in possession?] If there can be a joint possession the case of *Reg. v. Parr* (a) is wrongly decided. Here the prisoner never had the manual possession. [*Lord Campbell, C. J.*—Suppose the bargain to be struck, but the position of the parties with respect to the goods to have been unaltered, how would that have been? *Alderson, B.*—It is immaterial that the goods should have been paid for; if the parties had gone away and left the goods, giving the prisoner credit, that would have done. *Lord Campbell, C. J.*—Would it not have been sufficient if the thieves had parted with the possession until the price had been agreed upon? *Alderson, B.*—It is quite consistent with the direction of the Judge that the thieves had the possession from the first to the last. *Parke, B.*—The question here is whether taking the thieves into the stable with the goods was a possession of the goods with the thieves.] The construction attempted to be put is, that it was a receiving of the goods to take in the prisoners. Can a man be said to be a receiver of stolen goods who merely takes another person aside for the purpose of buying them? Here the prisoner had not the control of the stable; it was his father's stable. *Farina v. Home* (b) is a decision upon the meaning of the word "receive:" there *Parke, B.*, adopted the ruling of the under-sheriff who tried the cause;—"that to bring the case within the statute (the Statute of Frauds, s. 17) the acceptance, or receipt, must be with the intention of taking possession as owner." It may be said there is a difference in the cases, but the question is, what facts constitute a receiving under the statute? Was there not a *locus pœnitentie*? Suppose Wiley would not have given the sum demanded, there was nothing to prevent the thieves from

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(a) 2 Moo. & R. 346.

(b) 16 M. & W. 119.

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taking the goods away again. The question of actual or constructive possession was not left to the jury.

Liddle, for the Crown, would confine his remarks to what took place from the time of the thieves entering the house to the time they left it, particularly to what took place in the stable. Many of the arguments on the other side were based upon this fallacy; they confounded constructive possession with joint actual possession. *Reg. v. Parr (a)*, was clearly a case of constructive possession, as against *Holborne*. It was said that the possession of the thieves was antagonistic to that of the receiver. In *Rex v. King (b)*, where the prisoner assisted in carrying away some goods which had been previously stolen, the prisoner might have been indicted as a receiver at common law or under the statute, although there was no transfer of the goods from the thieves to *King*. A man may have actual joint possession. There may be actual possession without manual possession, as in the case of receiving and harbouring a prisoner; that is a potential possession. The question here is,—had Wiley any possession at all? Had he either actual or potential possession? At common law a man was a receiver who let another into his house and shut the door. Why was not the prisoner a receiver at common law in this case? he had exercised a control over the goods; but for that control they would not have been taken into the stable. In East's P. C. vol. ii. p. 765, it is said, "As to what general evidence shall be held to constitute a receiver under the statutes of W. & M. and Anne, and 22 Geo. III. c. 58, it is to be observed that the words of those acts are in the disjunctive, "receive *or* buy." Therefore it follows that in order to constitute a receiver generally so called, it is not necessary that the goods should be actually purchased by him; neither does it seem necessary that the

(a) 2 Moo. & R. 346.

(b) Russ. & R. 332.

receiver should have any interest whatever in the goods; it is sufficient if they be in fact received into his possession in any manner, *malo animo*, so as to favour the thief, or without lawful authority, express, or to be implied from the circumstances" (a). And if "to receive," and "to have in possession," are to be regarded as convertible terms, the statute 2 Will. IV. c. 34, against offences relating to the coin, gives us an interpretation: in sect. 21 it is enacted that where the having any matter in the custody or possession of any person is by that act made an offence, it shall be construed to mean any person having any such matter in his personal custody or possession, or knowingly and wilfully having it in a dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, and whether belonging to himself or not, or whether it shall be had for his own use and benefit or that of another. *Reg. v. Roges* (b) was a case arising upon that statute, and there it was held that "where pieces of counterfeit coin are found on one of two persons acting in guilty concert, and both knowing of the possession, both are guilty under the statute." There the argument was precisely that put forward for the prisoner in this case. The possession was joint from the moment the parties acted in concert in reference to the goods in question. *Reg. v. Gerrish* (c). [*Maule, J.*—Those were not cases of stolen money.] By potential possession must be meant having the physical power to take the thing into his own hand; if that be so it is impossible to conceive a stronger case of potential pos-

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(a) On the former argument *Liddle* added, that the same doctrine was recognised in *Reg. v. Davis*, 6 C. & P. 177; and that in *Reg. v. Richardson*, 6 C. & P. 335, Taunton, J., in summing up with respect to the receiver, said:—"Whether he made any bargain or not is a matter of no consequence. If he received the property for the mere purpose of concealment, without deriving any profit at all, he is just as much a receiver as if he had purchased it. It is a receiving within the meaning of the statute." He also cited *Reg. v. Gruncell*, 9 Car. & P. 365.

(b) 2 Moo. C. C. 85.

(c) 2 Moo. & R. 219.

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session (a) ; not only so, he exercised a control over them ; he had an actual possession. [*Coleridge*, J.—Do the words “as above,” include the taking to the stable?] He apprehended they did. If he was entitled to use the fact that the sack was on the stable floor at the time, and not in the manual possession of the others, it seemed to him to put the case beyond all doubt. Wiley had then a possession at least equal to that of the other prisoners.

Otter replied.

MARTIN, B.—I am of opinion this conviction is wrong. The case depends upon the construction of the statute 7 & 8 Geo. IV. c. 29, s. 54. Now I apprehend the true rule for the construction of statutes is that laid down by *Parke*, B., in *Becke v. Smith* (b), where he says, “It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further.” The question therefore is, what is the meaning of the word “receive” as used in the statute? I understand the facts of this case to be these. [He stated the facts.] Now I am of opinion that Wiley never did receive these articles, that he had no property in them, that the stealers had possession of the fowls, intending to hold them if the price was not such as satisfied them, and not intending that Wiley should have them unless the bargain was to their satisfaction ; and, therefore, that Wiley never did receive them. I also think it necessary that parties should understand with what they are

(a) Lord Campbell, C. J., said he could not attach any legal meaning to the word “potential.”

(b) 2 M. & W. 195, referring to *Burton*, J., in *Warburton v. Loveland*, 1 Hudson & Brooke’s Irish Reports, 648. See further, M. & W., General Index, p. 396, “STATUTE.”

charged, and that, to that end, the simple and ordinary meaning of the words should be adopted.

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TALFOURD, J.—I am also of opinion that this conviction is wrong upon the simple words of the statute. It appears to me that Wiley's position (as stated in the case) excludes any question as to whether he was exercising dominion over the fowls. He was in the situation of a purchaser who had not completed his purchase, and in whom, at the time, there was no right of possession.

WILLIAMS, J.—I am of opinion this conviction was right. If Wiley had conveyed the sack from the house to the stable he would have had possession of the fowls, with a corrupt and wicked mind, knowing that they were stolen; but the question is, whether, upon the facts stated, he was proved to have had possession. There is no doubt that all the parties had a common purpose in carrying the sack to the stable; for this purpose it was necessary that some one should have the manual possession. Wiley had it not, but it seems to me that they were all agents for the one common purpose; that the man who carried the fowls, had possession as agent for the prisoner, and that the prisoner was therefore properly convicted.

PLATT, B.—I am of opinion the conviction was wrong. In order to convict, it is necessary to show that the party was actually a receiver, that the goods were under his dominion. If it is to be taken, that while the sack was being carried to the stable, and Wiley was carrying the light, they were jointly in possession, it must be taken that the possession was of the same kind. Wiley's possession must have been the same as that of the others—the thieves; if so, how could he be convicted of receiving? As the bargain was open at the time, and as the thieves had the control and possession (not lawfully), and as it was not to be expected that the possession would have been parted with unless the bargain had been struck, it seems to

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me too much to say, that Wiley had received them, and therefore too much to say, "that the taking of Straughan and Williamson with the stolen goods," as set out, "by Wiley into the stable, over which he had control, for the purpose of negotiating about the buying of them, he well knowing the goods to have been stolen, is a receiving of the goods by him within the meaning of the statute."

ERLE, J.—I am of opinion this conviction was right, upon two grounds. Wiley co-operated with the thieves in taking the goods to the stable from the house, which was under the control of Wiley, for the purpose of more securely bargaining for the goods. If Wiley had taken part in carrying the goods, there is no doubt in the minds of many of the Judges, that that would have been a joint possession; and I am of opinion, that in the part he took in the transport of the goods, he was jointly in possession. I found this opinion, in some measure, upon the law, that if the thief asks a person to remove the goods stolen to a place of safety, and that person does so remove them, although he is not liable to be convicted of a larceny, he may be convicted as a receiver (a): from this it seems to me to follow, that if a person who so co-operates is criminally liable as a receiver, the prisoner in this case ought not to be acquitted. I am also of opinion the conviction ought to be sustained upon this ground.—With respect to felons, the rules of law in reference to civil rights have no application. Originally, the person who assisted the thief, was held to be an accessory; so with any person who harboured the thief; and in consequence of that being recognised to be the state of the law, receiving itself was made a substantive felony. I think the word, "receive," ought to be construed with analogy to the word "harbouring:" and if the receiver is the owner of the stable, and authorized the

(a) *Rex v. King*, Russ. & Ry. 332.

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thieves to deposit the goods there, he is a receiver of the property:—he is not the less a receiver, because the thieves remain there with the property. The earlier statutes did not contemplate that a bargain should constitute part of the receiving. The stat 29 Geo. II. c. 30, against receivers of stolen metal, made it an offence to leave open any door, window, or shutter, between sun-set and sun-rising, for the purpose of receiving, or to buy or receive in any clandestine manner. The offence contemplated in those statutes was, affording any assistance to the thief; and their object was to prevent any communication between the thief and any other party, so that the thief should not be able to find any place of deposit: no transfer of right was contemplated. In East, P. C. 765, it is laid down that it is not necessary that the goods should be purchased, or that the receiver should have any interest in them; it is sufficient if they be in fact received into his possession in any manner *malò animo* to favour the thief. The same rule is also laid down in 2 Russ. on Crimes, 247 (a), and it seems to me that the law contemplated such a receiving as this. I therefore think this conviction was right. I take it as a fact, that they were in a stable, over which Wiley had control.

CRESSWELL, J.—I am of opinion this conviction is right. The direction of the bench is the only point we have to consider. We must take the case as embodying the manner in which the fowls were brought to the father's house, and that they were removed from the house to the stable, Wiley aiding and assisting. If the goods had been removed by the thieves, in the first instance, from one part of the premises whence the goods were stolen to another part of the same premises, and there left, and Wiley had gone to assist in the removal, he would, no

(a) See note (a), *ante*, p. 373.

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doubt, have been guilty of larceny. If you substitute some other place of deposit, and Wiley had gone thither for the purpose of assisting the thieves in the removal, there would have been a joint removal; he would then have had a joint possession with them. By assisting to move them, as in the present case, he was clearly a concurring party, and therefore I am of opinion he was rightly convicted.

MAULE, J.—I think the conviction is wrong.

COLERIDGE, J.—I think the conviction is wrong. If the direction be construed strictly it must limit us to the fact, of Wiley, with a guilty knowledge, leading the thieves into the stable for the purpose of buying; but I think it more correct to include all the facts connected with the bringing of the goods to the house, and the conveying them to the stable. This view of the case does not include any previous concert in what had been going on before. I find, then, that he was guilty of helping them to a place of safety under his control, until a certain contingency should happen. It is not found that that contingency did happen, nor does it appear that Wiley was to be admitted to any possession until that did take place. I cannot find anything that amounts to the one or the other, and I therefore think this conviction wrong. I entirely agree with my brother Martin, and think, that in the construction of the word “receive” we should go upon the broad ground of common sense.

PATTESON, J.—I am, upon the whole, of the same opinion, that this conviction is wrong. I do not say there are no circumstances under which a joint possession can make the party a receiver; there may be such circumstances, but we do not find them here. The goods were all the while in the manual possession of the thieves, and the parties were arrested before the sacks were opened. How far the sack being upon the floor, and no one at that time being in the manual possession of it, may have been a conveying of the

possession to Wiley, I cannot now inquire ; because the case was not left to the jury upon that point, but upon Wiley's going to the stable with the thieves. I apprehend it was not intended to deliver the goods to Wiley until the bargain was struck ; but I do not wish to be considered as giving any opinion on this ground, because I believe the direction to have been wrong.

ALDERSON, B., said that he agreed with the majority of the Court, and thought that in all such cases there should be a broad and dividing point.

PARKE, B.—I am of opinion that this conviction is wrong. It is our duty, when a case is submitted to us, to consider only the precise point submitted, and not what would have been our conclusion as to the party's guilt or innocence had we been called upon to take into consideration all the circumstances. The words "as above," in the direction to the jury, must be taken to include all the preceding matter relating to taking the thieves into the stable. What we have to consider is, whether the direction was a proper one. I am of opinion the word "receive" is to be construed in its ordinary sense ; there is nothing before us to show that the goods were so received into the possession of the prisoner. All that we have, is the fact of his conducting the thieves with the goods into the stable. Strachan and Williamson had possession of the goods, and it does not appear that they had any intention to part with them unless a bargain had been entered into. It does not appear that such a bargain was made, or that Wiley had any charge of the goods. Then what is there in the direction more than this :—that lighting the parties into the stable with the sack was a receiving within the meaning of the statute ? I think that the statute requires a receiving into the possession of the prisoner ; and I think that this was no more a receiving into the possession of the prisoner than if it had been the case of a stolen watch, which one of

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the prisoners had had in his pocket during the whole of the time.

LORD CAMPBELL, C. J.—I agree with those Judges who think this conviction right. I think it is a receiving within the statute, wherever a person knowing the goods to have been stolen has possession of them for a bad purpose—*malo animo*; and it is immaterial whether he has possession of them as against the thieves. It is agreed there may be a possession other than a manual possession. What are the facts of this case? Wiley was in possession of the goods, knowing them to have been brought there for a bad purpose. The sack was to be carried from the house to the stable for an illegal purpose. For that purpose, was not Wiley in possession? There was no parting with the possession; but did not Wiley enter into the unlawful purpose? was he not a party engaged in removing the sack to the stable? Was not Williamson as much in possession as Strachan whilst the sack was so *in transitu*? If so, why was not Wiley? It is true, Wiley did not, any more than Williamson, assist in carrying the sack; but Wiley went before, carrying the candle. Suppose that Wiley had carried the sack, would he not have been in possession in so removing it from the house to the stable? Suppose he had assisted Strachan in carrying the sack, would there not then have been a joint possession? I think there would. Strachan carried the sack, and the others aided and abetted him: I think, therefore, there was what in law amounts to a possession by the three parties. It has been decided, over and over again, that there may be a joint possession by the thief and the receiver; but I do not stop there, because it appears to me from the case that the whole transaction was laid before the jury, and I think the whole of the facts are before us. In whose possession were the goods when the sack was on the floor? No one then had the actual possession: it was then as much in the possession of Wiley as of the others;

and I think you cannot say there was no possession unless the thieves had determined to part with the property, and the receiver had the whole and sole possession. I think, therefore, there is sufficient to enable me to come to a determination that there was a receiving in law by the prisoner Wiley.

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Upon the opinion of the majority of the judges the sentence must be reversed, and the Court below must be informed that the judgment of the Judges and of the Barons of the Exchequer is, that the party ought not to have been convicted.

Conviction reversed.

THE QUEEN *against* DAVID WILLIAMS.

1850.

Tuesday,
*Nov. 26 (a).*WARRANT, ORDER, *and* REQUEST.

The prisoner was convicted upon an indictment for uttering a certain forged warrant, order, *and* request, &c. In the indictment the instrument was set out verbatim. It was contended that the instrument was neither a warrant nor an order. Held (without deciding the point argued) that the instrument, having been set out upon the indictment, the prisoner was properly convicted.

The Court, for the purpose of assisting its judgment, will look at the indictment, although it be not set out in the case.

“ THE prisoner was tried before me (sitting for Mr. Justice Williams), at the last Chester Assizes, for forgery. The indictment charged the prisoner with forging, and in other counts with uttering, knowing the same to be forged, a certain warrant, order, *and* request for goods, with intent to defraud William Bevan. Other counts charged the intent to be to defraud Edward Lloyd.

“ It appeared in evidence that Lloyd, who was an ironmonger in Sidney Street, Manchester, was in the habit of buying ironmongery goods from Bevan, who was a smith and ironmoulder at Duckinfield, in Cheshire. Lloyd had for some time before the commission of the offences employed the prisoner to sell goods on commission. On the 22nd of December, 1849, the prisoner presented to Bevan a paper in the following terms, which was proved to be a forgery of Lloyd’s handwriting :—

“ ‘ Sidney Street, 22nd December, 1849.

“ ‘ Mr. Bevan,

“ ‘ S. Pleas to sen by Bearer a quantity of basket nails a clasp for

‘ E. LLOYD.’

“ Bevan, on the faith of this document being genuine, gave the prisoner nails to the value of 11s., which he disposed of for his own benefit.

“ It was objected for the prisoner that the forged instrument was neither a warrant nor an order, but only a request, for goods; and that, in order to satisfy the indict-

(a) This case had been argued in Easter Term last, on April 27th, before Lord Campbell, C. J., Parke, B., Alderson, B., Cresswell, J., and Erle, J.

ment, it must be a warrant and an order, as well as a request. *Regina v. Williams*, 2 Car. & K. 51, was referred to.

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“The prisoner was convicted on the counts for uttering; and I reserved for the judgment of this Court the following questions:—first, whether the forged paper was a warrant and an order, as well as a request; secondly, if not, whether the indictment was supported.

“W. N. WELSBY.

“April 16, 1850.”

M^r Intyre (for the prisoner). That this is not a warrant, order, *and* request is clear from the case *Rex v. Crowther* (a); and the objection here is, that in order to support the indictment the document must be a warrant, order, *and* request; that it must be all three. In *Reg. v. Williams* (b) the indictment was for forging a certain warrant *and* order; and *Wightman*, J., there said, “I am of opinion that the instrument is a *warrant*; and I am also of opinion that it is not an *order*, because it appears that the bankers were not bound to obey it, although in point of fact they did obey it. As it is described in the indictment as both a “warrant and order,” which it is not, I think that the variance is fatal, and that the prisoner must be acquitted.” And that is in accordance with *Reg. v. Gilchrist* (c). There the prisoner was indicted for stealing four warrants and orders; and the case being reserved for the opinion of the Judges, *Parke*, B., in delivering the judgment, said, “The judges are all of opinion that what is meant by the indictment is that you stole four instruments or four valuable securities, each of which is both a warrant and an order; and putting that construction upon the indictment they are of opinion that the instrument you stole was a

(a) 5 Car. & P. 316.

(b) 2 Car. & K. 51.

(c) Car. & M. 232.

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warrant and order. They are of opinion it is an order as well as a warrant." A check upon a banker would be a warrant, order, *and* request: such a document would satisfy each description; but the present document does not, because the party signing it (supposing it to be genuine) had no power to compel a compliance with the request. To be an order, the relation the parties bear to each other must be such that the person ordering has the power to command: *Reg. v. Newton (d)*. Upon that authority he should contend that this was not an order within the statute: it was merely a request. He relied upon *Reg. v. Gilchrist*, and the subsequent case of *Reg. v. Williams*; and he submitted that the conviction was wrong, and ought to be reversed. [*Lord Campbell, C. J.*—Was it not in some of the counts "a certain warrant, order, and request in the words following," setting it out.] The instrument was set out on the indictment. [*Cresswell, J.*—We think, for the purpose of assisting our judgment in this case, we may look at the indictment.]

Judgment deferred.

LORD CAMPBELL, C. J., now delivered the judgment of the Court as follows.—Inspection of the indictment removes all doubt upon this subject. The instrument was set out upon the indictment *in hæc verba*. The conviction was therefore right.

(*d*) 2 Moo. C. C. 59.

CORAM

POLLOCK, C. B.,
ERLE, J.,WILLIAMS, J.,
TALFOURD, J.,

MARTIN, B.

THE QUEEN *against* GEORGE DADSON.*Case reserved by the Honourable Justice Erle.*

SHOOTING WITH INTENT.

1850.

Tuesday,
Nov. 26.

“KENT Summer Assizes, 1850.—George Dadson was indicted for shooting at William Waters, with intent to do grievous bodily harm. It appears that he, being a constable, was employed to guard a copse from which wood had been stolen; and for this purpose carried a loaded gun.

“From this copse he saw the prosecutor come out carrying wood which he was stealing, and called to him to stop. The prosecutor ran away, and the prisoner, having no other means of bringing him to justice, fired, and wounded him in the leg.

“These were the facts on which the prisoner acted. It was alleged, in addition, that Waters was actually committing a felony; he having been before convicted repeatedly for stealing wood, but these convictions were unknown to the prisoner; nor was there any reason for supposing that he knew the difference between the rules of law relating to felony and those relating to less offences.

“I told the jury that shooting with intent to wound amounted to the felony charged, unless, from other facts, there was a justification.

The prisoner (a constable), guarding a copse, saw A. stealing wood therefrom. The prisoner shot at A. as the only means of preventing his escape. A. had before been repeatedly convicted of stealing wood, but those convictions were unknown to the prisoner. The prisoner was convicted of shooting with intent, &c. Held, that he was properly convicted, as, at the time, he did not know that A. had committed a *felony (a)*.

(a) By 7 & 8 Geo. IV. c. 29, s. 39, stealing underwood, &c. after two previous convictions is made *felony*.

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DADSON.

“ And that neither the belief of the prisoner that it was his duty to fire if he could not otherwise apprehend the prosecutor, nor the alleged felony, it being unknown to him, constituted such justification.

“ Upon this the prisoner was convicted of felony, and let out on his recognizance to come up for judgment, if required.

“ I have to request the opinion of the judges whether this conviction was right.

“ W. ERLE.”

This case was not argued by counsel on either side.

POLLOCK, C. B., delivered the judgment of the Court.— In this case, we are of opinion the conviction was right; because the man not having committed a felony known to the prisoner at the time, the prisoner was not justified in firing at him. Having therefore no justifiable cause for firing, he was liable to be convicted upon the charge (a).

(a) For the general law of arrest in criminal cases, *vide* 1 Burn, J., Arrest, 267; 5 Burn, J., Police; 6 Burn, J., Thames, 29th ed.; 4 Bla. Com. 292, and notes 18th ed.

CORAM

POLLOCK, C. B.,
MAULE, J.,CRESSWELL, J.,
WILLIAMS, J.,

TALFOURD, J.

THE QUEEN *against* JOSEPH BARNES.LARCENY *or* FALSE PRETENCES.

1850.

Friday,
Dec. 20.

“JOSEPH BARNES was tried before me at the last October Quarter Sessions, (in the year of our Lord one thousand eight hundred and fifty,) for the city of Canterbury and county of the same, upon an indictment which charged, that he, being servant to George Neame and another, feloniously stole two shillings and threepence, the property of his masters. The prosecutors were grocers in the city of Canterbury, and the prisoner at the time of the alleged offence had been their servant about three years. They were in the habit of purchasing large quantities of what was called ‘kitchen stuff,’ to melt down.

“The course of business was for the sellers of the ‘kitchen stuff,’ to take it to the prisoner upon Messrs. Neame’s premises. It was his duty to receive it and weigh it, and if the chief clerk was in the counting-house, to give to the seller a ticket containing the date of the purchase, the weight, the price, the name of the seller, and the initials of the prisoner. The seller then took the ticket to the chief clerk, who paid him the price out of moneys furnished to him by the prosecutors for that purpose. In the absence of the chief clerk from the premises, when any kitchen stuff was brought, the prisoner had authority himself to make the payment to the seller ;

A servant had authority from his employers to pay money on their behalf, and to demand repayment from their chief clerk. He falsely pretended to have paid a certain sum, and demanded repayment from the clerk. The clerk paid him the money. Held, false pretences, and not larceny.

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and, on afterwards producing to the clerk a ticket containing the above particulars, he repaid the prisoner out of the moneys so furnished to him by the prosecutors.

“The clerk was instructed by Messrs. Neame to pay all demands made by the prisoner in this way, upon the production by him of the ticket, without any inquiry as to whether any stuff had been really bought, or as to the quantity, or whether the alleged seller was or not a customer of the firm. Upon the evening of the 13th September, the prisoner went to the chief clerk in the counting-house and demanded two shillings and threepence, which he said he had paid for eight pounds of kitchen stuff. He produced a ticket in the usual form, containing the name of Scott as the seller, and two shillings and threepence as the price, and received that sum from the clerk from the moneys so furnished to him, which the prisoner applied to his own use.

“There had been no such dealing as that alleged by the prisoner, nor any such payment by him; nor had the prosecutors any customer of the name of Scott. It was objected, on behalf of the prisoner, that this was not a felony; because the property in the money and not the possession only was parted with by the prosecutors, and that the indictment should have been for obtaining money by false pretences, and *The King v. Mitchell*, 2 East, P. C. 830, was relied upon. I was of opinion, that although the facts might have supported an indictment for false pretences, yet that the prisoner, looking at the situation he filled as servant to the prosecutors, was guilty of felony, if the jury believed that he had obtained the money knowing at the time that he was not entitled to receive it, and had applied it to his own use. I left the facts to the jury, who found the prisoner guilty, and he was sentenced to be imprisoned four calendar months, with hard labour, in the city goal, where he now remains. I have to pray the

judgment of my Lords, the Justices and Barons sitting in a Court of Appeal, whether the facts stated supported the judgment.

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REG. v.
BARNES.

“ JOHN DEEDES,
“ Recorder.”

This case was not argued by counsel on either side.

POLLOCK, C. B.—We are of opinion that, when the money was delivered to the prisoner, it was delivered with the intention of parting with it altogether; and, although the prisoner might have been indicted for obtaining money under false pretences, he was not liable to be indicted for felony; the conviction therefore cannot be supported.

Conviction quashed.

1850.

Friday,
*Dec. 20.*THE QUEEN *against* ARTHUR FERRALL.

ORDER OF JUSTICES.

A soldier, who disobeys an order of justices to pay a certain sum per week to the mother of a bastard child, of which child he is adjudged to be the putative father, is liable to be indicted.

“ AT the Quarter Sessions for the Borough of Maidstone, held before me, as Recorder, on the 12th day of October, 1849, Arthur Ferrall, Sergeant of Dragoons, in Her Majesty’s service, at Maidstone, was tried for disobeying an order of two Justices of the Borough, made in Petty Sessions, on 20th July, 1849, whereby they adjudged the defendant to be the putative father of a bastard child, born on the 23rd of April, 1846, of Ann Kennard, and ordered him to pay to her the sum of 1s. 9d. per week from the 11th day of July, 1849, together with the costs of the order.

“ The order was made under the Act for the Amendment of the Poor Law, 7 & 8 Vict. c. 101, s. 3.

“ The order was duly served ; and, on the 23rd August, 1849, Ann Kennard demanded payment of the amount then due, and the defendant refused, and said he did not intend to pay, or to obey the order.

“ Upon that refusal no further proceedings under the Act or the order were taken, but the defendant was charged with, and indicted for, a misdemeanor, in not paying the sum due as required by the order.

“ The indictment, in the first count, after reciting the order, charged, ‘ That the said order, on the same 20th July, 1849, was duly served upon the said Arthur Ferrall, and he was required to obey the said order ; but the said Arthur Ferrall, soldier, upon being so served with the said order as aforesaid, and being so required to obey the same as aforesaid, did not pay unto the said Ann Kennard,

the mother of the said bastard child, (she being then living, of sound mind, and not in any gaol or prison, or under sentence of transportation,) the sum of 1*s.* 9*d.* per week, from the said 11th day of July then instant; the said child being then and still living, and under the age of three years, and the said Ann Kennard then and still being a single woman; neither did the said Arthur Ferrall pay to the said Ann Kennard the sum of 9*s.* 6*d.*, the costs mentioned in the said order, as by the said order he was required, but on the contrary thereof, he, the said Arthur Ferrall, then and there, and unlawfully and contemptuously, did neglect and refuse so to do, and he hath not since complied with the said order or any part thereof, although often required so to do, in contempt, &c., and against the peace,' &c.

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“The second count charged, ‘That the order of the said Justices hereinbefore mentioned, having been duly served, to wit, on the 20th day of July, 1849, aforesaid, afterwards, to wit, on the 23rd day of August, 1849, and after the expiration of one calendar month from the making of the said order, the said child being then living, and the said Ann Kennard, the mother, being then and still living, &c., she, the said Ann Kennard, did personally demand of the said Arthur Ferrall payment of the sum of 10*s.* 6*d.*, then due and owing for six weeks’ maintenance of the said bastard child, being at the rate of 1*s.* 9*d.* per week from the said 11th day of July, 1849, and also the sum of 9*s.* 6*d.*, the amount of costs mentioned in the said order, in obedience to the said order; but the said Arthur Ferrall, of, &c., soldier, upon such demand, and being so then and there required to make such payment as aforesaid, did not pay the said sums, or either of them, or any part thereof, as by the said order he was required, but, on the contrary, he unlawfully and contemptuously did neglect and refuse so to do, and he hath not since complied with the

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said order or any part thereof, although often required so to do, in contempt, &c., and against the peace,' &c.

“At the trial, evidence was given of the order, the service of it, and the demand and refusal of payment.

“The prisoner was undefended by counsel, but referred to the 52nd section of the Mutiny Act, (12 & 13 Vict. c. 10,) whereby it is enacted that ‘no person enlisted in Her Majesty’s service shall be liable to be arrested or taken therefrom by reason of any warrant of any justice or other process for not supporting or leaving chargeable any wife or child, legitimate or illegitimate, or by any process or execution whatsoever, except upon affidavit of debt exceeding 30*l.*, &c., other than for some criminal matter.’

“I directed the jury that, if they were satisfied with the evidence, they should find the prisoner Guilty; and mentioned that, if it should become necessary, I should take the opinion of the Judges upon certain questions of law in this case.

“The jury returned a verdict of Guilty.

“I respited the judgment till the next session, taking bail for the prisoner’s appearance there.

“The questions in this case which I reserved, and which I beg to submit to your Lordships’ determination, are—

“1st. Whether the indictment can be sustained.

“2nd. Whether, if it can, a sentence of fine or imprisonment, or both, can be effectually carried into execution against the defendant, a soldier, having regard to the provisions of the Act 12 & 13 Vict. c. 10, s. 52.

“There was no argument upon the above questions at the Sessions, and as there may be none before your Lordships, it seems right respectfully to state some of the considerations which led me to entertain doubts in this case.

“I doubted whether an indictment will lie for disobedience of the order in question, on three points.

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“1st. That the Act under which the order was founded, and under which alone the liability of the father exists, gives a specific process to enforce the order, which should have been specifically pursued.

“2nd. That the maintenance of a bastard child is not at common law a duty obligatory upon the putative father, and its neglect no offence indictable at common law, or by any statute.

“That by the Act 7 & 8 Vict. c. 101, s. 4, the money which the justice may order to be paid by the father is due and payable to the mother, and so recoverable by her in an action of debt, as well as by distress under the Act. That it is purely a matter between party and party, the order being in the nature of civil process, not concerning any public duty or offence against the Queen or public: and that disobedience of such an order is not indictable as a misdemeanor.

“3rd. I also doubted whether the form of this indictment is right. The offence (if any) at common law is the disobedience of an order of justices. The charge is not directly that he disobeyed the order, but that he neglected and refused to pay the sum due as required by the order, &c. The charge however amounts, inferentially, to a charge of disobedience, and the indictments in the cases mentioned below were of the same form.

“Upon the first point, considering the resolution in *Castle's case*, Cro. Jac. 643, that when a statute appoints a penalty for doing that which was no offence before, and appoints how it should be recovered, the offence shall be punished by that means and not by indictment. I should have decided at the trial that the indictment did not lie, had it not been for the similarity of the circumstances in *R. v. Robinson*, 2 Burr. 799; where Lord Mansfield, while repeating that principle, decided that disobedience of an order of justices, (under 43 Eliz. c. 2, s. 7,) upon a grand-

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father to maintain his grandchild was indictable, and for the case of *Reg. v. Bidwell*, 1 Den. C. C. 222, an indictment for disobedience of an order of justices for the payment of church rates. I have since referred to the case of *Reg. v. Brisby*, 1 Den. C. C. 416, an indictment similar to the present, and relating to a similar order.

“ In neither of these cases, however, were any of the points in question discussed or raised.

“ The present case is distinguishable from *R. v. Robinson*, the leading case. Lord Mansfield must have there considered that the same offence, which was subject to a penalty to be enforced by an order of justices and distress, by 43 Eliz. c. 2, was also indictable ; or if otherwise, and yet disobedience of the order was indictable, the distinction expounded by him with reference to *Castle's case* fails of substantial effect.

“ In this case there is no offence at all before or except the disobedience of the order. The neglect to maintain a bastard child is not now an offence punishable. The putative father is not at common law liable for its maintenance, and no order can be made upon him except under 7 & 8 Vict. c. 101.

“ The Act 4 & 5 Will. IV. c. 76, s. 69, repealed so much of any Act as rendered any putative father of a bastard child liable to punishment, or to contribution as such, and provided that he might be ordered by the Court of Quarter Sessions to pay a weekly sum for the maintenance of his child, if chargeable to the parish. That provision and all powers of charging such father were repealed by the 7 & 8 Vict. c. 101, s. 1.

“ By that Act, the justices in petty sessions may order (as in this case) a weekly payment by the putative father to the mother, for the maintenance of the child ; and (sect. 3) if at any time after one month from the making of such order any sum ordered shall not be paid, a warrant may

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issue to bring up the putative father, and in case he neglect or refuse to pay the sum due from him under such order, it may be recovered by distress and sale of his goods ; and such putative father may be kept in custody until the return of such warrant, unless he give security for his appearance ; and if upon the return, or by admission, it shall appear that no sufficient distress can be had, two justices may commit such putative father to gaol for not more than three months, unless such sum, and all costs, &c., be sooner paid. And it is further enacted (sect. 4), that all money payable under any order aforesaid shall be due and payable to the mother of the child. By 8 & 9 Vict. c. 10, in the schedule, forms are given (No. 10) for the information of the mother on disobedience of such an order ; and (No. 11) warrant of apprehension for disobedience of the order.

“As to the second point :—The 7 & 8 Vict. c. 101, gives the mother a new demand against the father for such a sum as the justices shall order, which she may recover by summary process according to that Act, or by action in the County Court ; in either case it seems a matter of civil right, with a civil remedy between party and party, not affecting the Queen or public, unlike an assault, nuisance, &c., which may concern as well the public peace as any individual sufferer, and so admit both of criminal and civil proceedings.

“If an indictment for disobedience of such order of justices, made in a matter not concerning the Queen or the public, can be sustained, because it is the command of the law, the principle will extend not only to every such order of justices in their summary jurisdiction, (as for the payment of wages 4 Geo. IV. c. 34, and the like ;) but *à fortiori* to disobedience to any judicial order of a supreme Court, as Chancery (*e. g.* for payment of money), the Queen’s Bench, &c., in matters between party and party, thus tending to

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the confusion of civil and criminal procedure, and to facilitate extortion and oppression.

“A conviction upon this indictment would be no bar to proceedings by distress or action to recover the same sum now charged to be due, nor to any indictment for any future like offence, under the same order upon any new default in the weekly payments ordered. The same law must apply to the civilian as the soldier; it cannot be presumed that a soldier will disobey a warrant to appear before justices, or not have goods to answer a distress.

“I entertained doubts as to the effect of the 52nd section of the Mutiny Act (*a*), with regard to a sentence of imprisonment to enforce a fine; but, as none but criminal acts are indictable, if this indictment be sustained probably such imprisonment would be legal ‘as process for a criminal matter,’ although it would not be as process ‘for not supporting the illegitimate child.’

“WALTER B. RIDDELL,

“Recorder of Maidstone.

“Lincoln’s Inn,

“24th November, 1849.”

Welsby, (instructed by the Treasury,) appeared for the defendant.—The first question was, whether the indictment could be sustained. The ground upon which it was suggested that it could not, was, that it stated no offence at common law for which the party could be indicted; neither was it, since the passing of 4 & 5 Will. IV. c. 76, s. 69 (*b*), any statutable offence to neglect to maintain a bastard child. The statute 7 & 8 Vict. c. 101, ss. 2 & 3, gives a remedy against the putative father, by proceeding before a ma-

(*a*) 12 & 13 Vict. c. 10.

(*b*) Repealing Acts relating to liability and punishment of putative father, and punishment of mother, of illegitimate children.

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gistrate, who thereby may make an order on the putative father for maintenance and costs, and enforce the same by distress and commitment (a). It occurred to him, the answer to that argument was, that this was not an indictment upon the statute, but at common law, for disobedience of an order of justices: precedents of an indictment for disobedience to an order of the justices are to be found in the books (b). The material question, however, is, whether this defendant is exempted by the provisions of the Mutiny Act. [*Pollock*, C. B.—There is a difference between the payment of money, and doing any other act, as for instance, being sworn in as a constable, &c. Suppose the man has no money, how can it be said to be a crime not to pay the money which he has not?] The Mutiny Act in force at the time, was the 12 & 13 Vict. c. 10. By s. 52, it is enacted, that no person enlisted into her Majesty's service as a soldier, shall be liable to be arrested or taken therefrom, by reason of the warrant of any justice or other process for not supporting, or for leaving chargeable to any parish any child, legitimate or illegitimate, or by reason of any process or execution whatsoever, other than for some criminal matter, except upon an affidavit that the original debt amounted to 30*l.* at least, over and above all costs of suit. This provision was, by 11 & 12 Vict. c. 11, s. 52, introduced for the first time. It is again in the 12 & 13 Vict. c. 10, s. 52, with the addition of the words "or by any process, order or execution issued out of, or from, any County or inferior Court, or by any Judge or officer thereof, either for contempt of Court, or otherwise," excepting any criminal matter, &c., as before.

(a) See *Reg. v. Evans*, 19 L. J., M. C. 150; *Reg. v. Brisby*, ante, p. 109.

(b) See *Rex v. Robinson*, 2 Burr. 799, and other cases referred to in Harrison's Dig. Criminal Law, 2130; *Reg. v. Mortlock*, 7 Q. B. 459; *Reg. v. Bidwell*, 17 L. J., M. C. 99; Dick. Q. S., 454 and 457, 5th ed.; Russ. on Crim. 44, 412.

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Now this was an indictment to be followed up by judgment and a sentence of imprisonment; that imprisonment being a "process and execution" within the meaning of the Mutiny Act. The intention was, that the Crown should not be deprived of the services of the soldier, except in the case of a debt of 30*l*. The words "any process," must refer to an order of a justice. The award of execution is "process" within the meaning of the Act; and in no sense can this be called a criminal matter. [*Pollock*, C. B.—It is, inasmuch as an indictment will lie.] The case might be visited by either a fine or by imprisonment. [*Pollock*, C. B.—Is a party liable to imprisonment for non-payment of a fine when the judgment is simply that he pay a fine?] He apprehended he was. It might be assumed that he would pay the fine. This is a proceeding which may result in depriving the Crown of the services of the soldier, and therefore this Court would stop such a proceeding *in limine*. By virtue of this indictment, the party is liable to be taken in execution, and the statute says that he shall not be so taken. [*Talfourd*, J.—Suppose the party should cease to be a soldier.] The Court will presume a continuance of the present state of things; or otherwise the statute would be inoperative altogether. The statute in using the words "criminal matter," refers to some crime committed against the realm. Is non-payment of money a "criminal matter" within the meaning of the statute? The power of dismissal in that section of the statute, applies to all the previous matters. When a soldier is arrested for not maintaining a bastard child, he is arrested contrary to the intention of the Act. Section 81 (a), shows what is meant by a "criminal matter;" "any crime or offence against the person, estate, or property of any of her Majesty's subjects, which is punishable by the

(a) Stat. 10 & 11 Vict. c. 12.

well known laws of the land." An attachment out of the Court of Chancery has been held not to be a "criminal matter," although it is of a *quasi* criminal nature. The section then goes on to say, that if any commanding officer shall obstruct, neglect, or refuse to assist the officers of justice in apprehending any officer or soldier under his command, so accused as aforesaid, such officer shall, upon conviction, be cashiered, and thenceforth disabled to hold any civil or military office. Now when you have one section in a statute, saying that a soldier shall not be liable to be arrested, except upon some criminal matter, or upon a debt of 30*l.* at the least; and another section in the same statute, making it an offence in a superior officer not to deliver over to the civil magistrate a soldier accused of any crime or offence against the person, estate, or property of any of her Majesty's subjects; and making it an offence not to deliver over in such case only, it shows that the party shall not be liable to be arrested, except for such criminal matter as is within the meaning of that statute. This is a proceeding for punishing a man for not paying a sum of money. If this conviction is good, a judgment must follow upon it; the party must be arrested in order to submit to that judgment; and in such process he must be taken from the service of the Crown. [*Talfourd, J.*—Upon the same principle he would not be liable to an action in the County Court.] That is a mere civil statute. Imprisonment is not, at all, the legal consequence of a proceeding in that Court, but this is a proceeding whereby the liberty of the soldier will be restrained; that will be the necessary result of the judgment. By such restraint, the soldier is deprived of the power of serving the Crown. He therefore submitted, that the Court would give judgment in favour of the defendant.

POLLOCK, C. B. (a).—In this case, the Court are of

(a) Friday, 20th December, 1850.

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opinion that the conviction was right. The cases have for so long a series of years decided, that an indictment will lie for disobeying an order of Sessions for the payment of money, that we cannot disturb this conviction. I cannot, however, help saying for myself, speaking my own individual opinion, that it appears to me, that this is not the subject of an indictment. An order of any other court cannot be so enforced. But the point has been decided so long, that I do not think there is any prospect of an alteration in our decision by an adjournment of the case, and I feel bound by the authorities to concur; but I cannot help expressing my own dissent from the doctrine,—that where an Act of Parliament (*a*) has provided a substantive remedy by giving the justices the power to commit, for not exceeding three months, for disobedience of this order, the party may still be indicted before the Quarter Sessions for the same offence, where upon his being tried and convicted, there is nothing to prevent that Court from passing on him a sentence of four or six months, or even a longer imprisonment (*b*). With

(*a*) See Stat. 7 & 8 Vict. c. 101, s. 43.

(*b*) In many instances there is no other mode of enforcing such payments, and this may be the reason why the legal order of a justice for the payment of money can be enforced by indictment, see *Rex v. Boys*, Trin. 27 & 28 Geo. II. B. R., cited in *Rex v. Robinson*, 2 Burr. 805, see *Ib.* 804; see also *per* Lord Mansfield, in *Rex v. Jackson*, 1 Cowp. 297, and other cases cited below.

An indictment is the means of a prosecution instituted by the Crown, (as supreme magistrate,) against some person or persons, for an act done or omitted, the doing or omitting of which, with impunity, is calculated to work an injury to the public, or which act or omission is made illegal by a public statute or by a private statute affecting public rights; therefore (*generally speaking*) a misdemeanour at Common Law, being an act or omission prejudicial to the well-being of society, is indictable; *Reg. v. Dixon and Wife*, 10 Mod. 336; and see *Reg. v. Webb*, *ante*, p. 23; *Reg. v. Crisp*, 6 Mod. 175; *Reg. v. Higgins*, 2 East, 5, and cases there cited; *Rex v. Edwards*, 1 Sess. Ca. 336, c. 265; *Ib.* ca. 267; *Reg. v. Great North of England Railway Company*, 16 L. J., M. C., 16; Vin. Abr. Indictment, F. G. H.; Bac. Abr. Indictment, E.; Com. Dig. Indictment, D.; Rol. Abr. Indictment. Neglect of a legal

respect to his being a soldier, he is not on that ground entitled to his discharge ; a criminal case being expressly excepted by the statute.

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Conviction affirmed.

and moral duty towards one of tender years, *Rex v. Friend*, Rus. & Ry. 20 ; *Reg. v. Waters*, ante, p. 57 ; *Rex v. Smith*, 2 Car. & P. 456. An act done with intent to commit a misdemeanour ; *Rex v. Scofield*, Cald. 397 ; *Rex v. Phillips*, 6 East, 464 ; *Reg. v. Chapman*, ante, 90. Private trespass, *Rex v. Edmonds*, 1 Sess. Ca. 359, ca. 288 ; contra, *Reg. v. Tomlinson*, 2 Sess. Ca. 18, ca. 22.

If a statute creates an offence, against the public, without a remedy, it is indictable, *Hollingworth's case*, Cro. Jac. 577 ; *Rex v. Burgaine*, Sid. 409 ; 2 Hawk, P. C. c. 25, s. 4 ; *Rex v. Robinson*, 2 Burr. 799 ; *Rex v. Balme*, 2 Cowp. 650 ; *Rex v. Harris*, 4 T. R. 202. But it must be a public statute, and the act must be one affecting the public, and not an individual only, as in the case of an excessive distress ; see *R. v. Legingham*, 1 Mod. 71. In *Pawlyn's case*, 1 Sid. 209, Twisden, J., said, " If a private act, provides for a thing the nonfeazance of which may be prejudicial to several persons, as for paving the streets, &c., an indictment will lie. But if the nonfeazance is an injury to one or two only, then no indictment shall lie." Bac. Abr. Indictment, E ; see 2 Hawk. P. C. c. 25, s. 4.

So the nonperformance of any act commanded by statute is an indictable misdemeanour ; *Rex v. Jones*, 2 Str. 1146 ; S. C. 2 Sess Ca. 326, ca. 187 ; *Reg. v. Price*, 11 Ad. & E. 727 ; *Sir John Read's case*, 2 Mod. 301.

So the nonperformance of an act ordered to be done by one justice or more acting on behalf of the supreme magistrate, and having authority at common law so to order is indictable : *Rex v. Robinson*, 2 Burr. 804 ; *Rex v. Boyall*, 2 Burr. 832 ; *R. v. Balme*, 2 Cowp. 650 ; *R. v. Harris*, 4 T. R. 205.

So the nonperformance of an act ordered to be done by one justice or more having an authority by statute so to order is indictable : *Rex v. Davis*, cited in *Rex v. Robinson*, 2 Burr. 804 ; see *Rex v. Pine*, 3 Keb. 628, 686, 854 ; *Reg. v. Mortlock*, 9 Jur. 621 ; *Reg. v. Brisby*, ante, p. 109.*

Where a statute makes that illegal which was legal before, and in the same grammatical sentence subjects the party doing such act to certain pains and penalties upon certain proceedings being taken, (other than indictment,) as in the same sentence enacted, such offence is not indictable : *Castle's case*, Cro. Jac. 644 ; *Rex v. Pensar*, 2 Sess. Ca., ca. 158 ; S. C. 1 Barn. 127 ; *R. v. Smith*, 1 Sess. Ca. 42 ; S. C. Salk. 680 ; *R. v. Buck*, 2 Str. 679 ; *R. v. Robinson*, 2 Burr. 803 ; *Rex v. Davyes*, 3 Keb. 34 ; *Rex v. Wright*, 1 Burr. 543 ; see *Rex v. Dixon and wife*, 10 Mod. 336 ; *R. v. Norwich*, 1 Str. 180 ; *Hartley v. Hooker*, Cowp. 524 ; *Reg. v. Buchanan*, 8 Q. B. 883 ; S. C. 10 Jur. 736 ; 15 L. J., Q. B., 227 ; Bac. Abr. Indictment, E. It was, however, held otherwise in *R. v. Crofton*, 1 Mod. 34 ; S. C. 1 Vent.

* Where justices license informally, or without jurisdiction, the party acting under such license, in ignorance of its illegality, is (*semble*) not liable to be indicted, *R. v. Bryan*, Andrews, 82.

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63; 2 Keb. 595, 614; and Sid. 249, but Siderfin doubted the law in that case, as appears by his report, and Lord Mansfield in *R. v. Wright* said that case had been denied many times; see also *R. v. Manning*, Fitzg. 47.

So where the statute, without prohibiting an act imposes a penalty upon the doing it, the object being to increase the revenue, it is not indictable; see 2 Hale's P. C. 171; *R. v. Wright*, 1 Burr. 543; *R. v. Savage*, 1 Ld. Raym. 347; and see *Smith v. Mawhood*, 14 M. & W. 452; *Crofton's case*, Vent. 63; *Rex v. Manning*, Fitzg. 47.

It is said that where a statute, by a substantive clause, makes that illegal which was legal before, imposing certain pains and penalties, and by a subsequent section of the same statute or a subsequent statute ordains a mode of proceeding different from that by indictment, the prosecutor may proceed by indictment upon the substantive clause as for a misdemeanour at common law, or in the manner pointed out by the statute: *R. v. Gold*, 6 Mod. 164; 1 Salk. 380, S. C.; *R. v. Harris*, 4 T. R. 205; *Rex v. Davyes*, 3 Keb. 34; 2 Hale's P. C. 171; *R. v. Boyall*, 2 Burr. 832 (in this case Lord Mansfield, C. J., said, "I do not approve of indicting where there is another remedy; it carries the appearance of oppression:" see also by the same Judge in *Rex v. Robinson*, 2 Burr. 804); *Rex v. Balme*, Cowp. 648; *Rex v. Hube*, 5 T. R. 543; *Read's case*, 2 Mod. 301; Bac. Abr. Indictment, A.; *Rex v. Wright*, 5 B. & Ad. 555; *R. v. Gregory*, 2 Nev. & M. 478; *Reg. v. Buchanan*, 8 Q. B. 883; S. C. 10 Jur. 736; 15 L. J., Q. B., 227. But in *R. v. Marriott*, Show. 398, 4 Mod. 144, which was an indictment for keeping an alehouse contrary to the stat. 5 & 6 Edw. VI. c. 25, and the mode of punishment was directed by a subsequent section, the Court after taking time to consider held that the indictment could not be maintained; that where a statute creates a new offence and prescribes a particular method of punishment, that method alone must be pursued, and not the common-law method by indictment, and see stat. 3 Car. I. c. 3 (4), s. 5; *Stephens v. Watson*, 1 Salk. 45; affirmed, 6 Mod. 86; see also Haw. P. C. c. 25, s. 4; *Slowman v. West*, Palm. 388; *Rex v. Goodwin*, 1 Sess. Ca. 7; *Rex v. Bond*, 1 Sess. Ca. 108; *Sir John Knight's case*, 3 Mod. 117; *R. v. Sparks*, 3 Mod. 78; 7 Rep. 36. "Where a statute prescribes that a thing shall be by bill, plaint, or information, it cannot be by indictment," *Rex v. Ghuff*, 12 Mod. 104.

Where the offence is antecedently punishable at common law, and a statute prescribes a particular remedy by a summary proceeding, the party may be indicted or proceeded against according to the statute: *Rex v. Robinson*, 2 Burr. 803; *Rex v. Dixon and Wife*, 10 Mod. 336; *Rex v. Norwich*, 1 Str. 180; Bac. Abr. Indictment, E.

As to the removal of the indictment in such case, see *Hartley v. Hooker*, Cowp. 524.

If the party have, upon action brought against him, paid a fine to the king it seems questionable whether he may afterwards be indicted, because that would make him liable to a second fine for the same offence; 2 Haw. P. C. c. 25, s. 4; Bac. Abr. Indictment, E. In this case it would be a second remedy for the Crown.

But it is said that when a person is aggrieved by the breach of any statute by another, he who commits the breach is punishable at the suit of the party aggrieved, and may also be indicted for his contempt of the statute unless such method appears manifestly to be excluded; 2 Haw. P. C. c. 25, s. 4; Vin. Abr. Indictment, (H. 3,) but see 12 Mod. 446; and see also *Stevens v. Jeacocke*, 11 Q. B. 731.

If a misdemeanour at common law be made felony by statute, the party must be indicted for the felony under the statute; *R. v. Crosse*, 12 Mod. 634; 1 Ld. Raym. 711; 3 Salk. 193; see *Reg. v. Button*, 11 Q. B. 929.

But where a statute makes that punishable as a misdemeanour which was felony before, it may be prosecuted either way: *R. v. Pollard*, 2 Sess. Ca. 17.

Where a statute enacts that a forfeiture may be sued for by action, information, bill, or *otherwise*, the party may be indicted: *Rex v. Dixon and Wife*. 10 Mod. 336.

Where a certain amount of fine is imposed by statute, and the party is indicted, that amount should regulate the judgment. Bac. Abr. Indictment, A.

Where there is no appropriation of a statute penalty it is a debt due to the Crown, and suable for in a Court of Revenue and not by indictment: *Rex v. Malland*, 2 Str. 827.

If a statute appoint an indictment at a *general quarter sessions*, an indictment at a *general sessions* is ill: *Rex v. Tumock*, 12 Mod. 117.

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HILARY TERM.

IN

THE FOURTEENTH YEAR OF THE REIGN OF VICTORIA.

CORAM

JERVIS, C. J.,
PATTESON, J.,CRESSWELL, J.,
ERLE, J.,

MARTIN, B.

THE QUEEN v. MORTIMER KEALEY.

*Saturday,
January 18,
1851.*

FALSE PRETENCES.

An indictment charging an attempt to obtain goods from A., *and others*, (partners in trade,) by false pretences made to A. *and others*, is supported by proof of false pretences to A. alone.

“ AT a General Session of Gaol Delivery holden for the jurisdiction of the Central Criminal Court on Monday the 10th day of June in the year of our Lord 1850, Mortimer Kealey was tried before me upon an indictment charging him with the common-law misdemeanour of attempting to obtain goods by false pretences, and to defraud the owners thereof contrary to the statute.

“ The indictment charged that the defendant made the pretences set forth in the indictment to John Baggallay *and others* with intent to obtain and defraud them of the goods in question, their property.

“ John Baggallay and others were partners in trade, and it appeared in evidence that the defendant in fact made those pretences to John Baggallay, one of that firm, but that Mr. Baggallay refused to part with the goods sought to be obtained, in consequence of information regarding the defendant received from another person. It also appeared

that none of Mr. Baggallay's partners were present when the pretences were made, and there was no evidence of the false pretences having ever reached the ears of any one of them. It was objected, on the trial, that the proof did not support the averment in the indictment of the pretences having been made to John Baggallay *and others*; that the variance was fatal, and the prisoner entitled to his acquittal. But I decided that the objection ought not to prevail and the defendant was convicted. It appearing however to me that the point raised on the trial was one of doubt, and entitled to the consideration of the Justices of either bench and the Barons of the Exchequer upon a case reserved, I postponed judgment in order that the opinion of the said Justices and Barons might be taken upon such case, and committed the defendant to the custody of the keeper of the gaol of Newgate until the next session, unless he previously entered into recognizances, himself in 200*l.* and one surety in 200*l.*, or two sureties in 100*l.* for his appearance at the said next session to receive judgment.

“The foregoing is the case upon which the opinion of the said Justices is required accordingly.

(Signed)

“RUSSELL GURNEY.”

Parry, for the defendant, after stating the case, said there was a fatal variance between the pretence laid in the indictment and the pretence proved. The allegation of the false pretence, in an indictment for false pretences, was a material allegation, and should be correctly laid—and strictly proved as laid (*a*). The object of this particularity was, to give notice to the defendant of the false pretence which he was brought there to meet. The false pretence alleged, was, “That he did, &c. falsely pretend to John Baggallay *and others* ;” and in support of that allegation,

(*a*) Arch. C. Pl. Cheating, p. 312, last ed.

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it was proved that the false pretence was made to John Baggallay alone, and to no other person. It is an inference of law that if property is stolen it belongs to all the partners, but there is no inference in law that a false pretence made to one partner of a firm is made to all the partners. The indictment does not charge that the false pretence was made to John Baggallay and others his partners, but simply to John Baggallay *and others*. A party cannot be indicted for stealing the property of a person named, "*and others*," at common law; it is only by virtue of the stat. 7 Geo. IV. c. 64, s. 14, (a) that he can be so indicted, and that statute does not enable a prosecutor to lay a false pretence, as having been made to the person named *and others*, for it only applies to *property* being so laid. If a person makes a false pretence to the clerk of A., by means of which he obtains the property of A., the false pretence must be laid as made to the clerk, and not to A. So an allegation that a false pretence was made to A. and others cannot be supported by evidence that it was made to A. alone. In *Rex v. Plaistow* (b), Lord Ellenborough said, "In an indictment for obtaining money by false pretences the pretences must be distinctly set out, and at the trial they must be proved as laid." He also cited *Rex v.*

(a) 7 Geo. IV. c. 64, s. 14. "And in order to remove the difficulty of stating the names of all the owners of property, in the case of partners and other joint owners, be it enacted, that in any indictment or information for any felony or misdemeanour, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint-tenants, parceners, or tenants-in-common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others as the case may be. And whenever, in any indictment or information for any felony or misdemeanour, it shall be necessary to mention, for any purpose whatsoever, any partners, joint-tenants, parceners, or tenants-in-common, it shall be sufficient to describe them in the manner aforesaid. And this provision shall be construed to extend to all joint-stock companies and trustees."

(b) 1 Camp. 494.

Douglass (a). In *The King v. Mason* (b) it was held, that an indictment charging the defendant with obtaining money by false pretences is insufficient if it does not show what the false pretences were; and, if the defendant be convicted on it, the Court will reverse the judgment upon a writ of error. Therefore a general statement of the case is not sufficient. In *R. v. Perrott* (c), Lord Ellenborough said, "Every indictment should be so framed as to convey to the party charged a certain knowledge of the crime imputed to him." This indictment does not do so, for it says that he made a false pretence to John Baggallay and others, whereas the truth is that he did not. How can he then have a certain knowledge of the crime imputed to him? [*Cresswell*, J.—The indictment can hardly be said not to convey a knowledge of the charge, for it sets out the name of the person to whom the pretence was made.] Lord Ellenborough, in *The King v. Perrott* (c), goes on to say, "When a party is called on to answer for obtaining money by a false pretence, it is but reasonable that he should have the same notice as in perjury, by proper averments of that which is intended to be relied on against him." [*Erle*, J.—Suppose one of the parties to be hard of hearing, and that, though the pretence was made in his presence, he did not hear it, it would be a false pretence to both.] Then that fact should appear if it occurred. It was not left to the jury, nor were the witnesses asked whether the prisoner intended to make the representation to all the firm. There was no proof that he intended to make it to any but John Baggallay; at all events there should have been some proof as to what the word "others" meant in this indictment. In a civil action there might have been an amendment; *Masters v. Barrets* (d); but in the present instance there

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(a) 1 Camp. 212.

(b) 2 T. R. 581.

(c) 2 M. & S. 385-6.

(d) 2 C. & K. 717. *Bristow v. Wright*, 1 Sm. L. C. 324.

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was no application to amend (a). He therefore submitted that the prisoner was entitled to the judgment of the Court. But if the Court decided against him, he apprehended that he could now move in arrest of judgment. [*Jervis, C. J.*—That is not a point reserved.]

No counsel appeared for the Crown.

JERVIS, C. J.—I am of opinion that the conviction in this case was right. There are three ways in which the allegation in the indictment may be viewed. First, on the stat. 7 Geo. IV. c. 64, s. 14, the word “others” might be considered to mean the partners of Baggallay. Then it would be important to consider whether a representation made to one member of a firm was not a representation made to the whole firm, it being concerning the partnership business. I am inclined to think it would, but it is not necessary to decide that point. Secondly, it might mean to John Baggallay and several others; and if so, I think that a pretence alleged to be made to A., B. and C. is sufficiently proved by evidence of its having been made to A.; and, thirdly, I think the words “and others” mere surplusage in this indictment, and that the allegation was sufficiently proved by the pretence having been shown to have been made to Baggallay.

PATTESON, J.—I am of the same opinion. The words “and others” are mere surplusage, for you cannot use them except under the statute in alleging the ownership of property.

CRESSWELL and ERLE, JJ., concurred.

MARTIN, B.—I am of the same opinion; and am also inclined to think that a representation to one of a firm is a representation to the others, the one being an agent for the rest; but it is unnecessary to consider that question.

Conviction affirmed.

(a) See Arch. Cr. Pl. Demurrer.

THE QUEEN *against* PATRICK WELSH.

UTTERING COUNTERFEIT COIN.

1851.

*Saturday,
January 18.*

“THE prisoner was convicted at the Quarter Sessions of the Peace for the North Riding of Yorkshire, on the 31st of December, 1850, and the following case was stated for the consideration of the Judges.

“The indictment charged the prisoner with having ‘uttered and put off,’ but not with having ‘tendered,’ to one Benjamin Dunning a counterfeit shilling. The evidence proved that the prisoner went into the shop of Dunning and asked to purchase some coffee and sugar, and in payment of the same he put down on Dunning’s shop counter the counterfeit shilling in question, when Dunning took it up and said to the prisoner that the shilling was a bad one.

An indictment for “*uttering and putting off*” counterfeit coin is satisfied by evidence of a *tender* of the coin.

“The prisoner then left Dunning’s shop, leaving the shilling, but without the coffee and sugar. The prisoner was found guilty, and sentenced to be imprisoned and kept to hard labour for two calendar months; but execution of the sentence of hard labour was respited for the month. The prisoner is in gaol for want of bail to render himself in execution. I have now to request the opinion of the Judges whether the charge of having ‘uttered and put off’ was proved by this evidence.

“JAMES PULLEINE.”

No counsel appeared on either side.

JERVIS, C. J.—The objection in this case is, that the person to whom the coin was offered did not take it; and it is supposed that the averment, that the prisoner “uttered

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and put off" is therefore not satisfied by the evidence. It has been constantly determined as sufficient whether the coin has or has not been taken by the other party. The conviction was therefore good.

Conviction affirmed.

The words of the statute 2 Will. IV. c. 34, s. 7, are, "if any person shall tender, utter, or put off any false or counterfeit coin," &c. ; See Arch. Crim. Law, Forgery, p. 371, 9th ed.

THE QUEEN *against* ELIZABETH GRAY,

IN

THE QUEEN *against* WILLIAM DOVEY AND ELIZABETH GRAY.

JOINTLY "RECEIVING."

1851.

Saturday,
January 18.

" AT the Epiphany Quarter Sessions for the county of Hants, holden at Winchester, on the 30th December, 1850, William Dovey and Elizabeth Gray were charged, in an indictment, a copy of which is hereunto annexed (*a*), in the first count, with stealing, and in the second count with receiving, twelve turkeys, knowing them to have been stolen.

A. received from the thief. B. subsequently received from A. Held, that B. could not be convicted upon a count charging a joint receiving by A. and B.

" Dovey and a man named Hodder, who had absconded, both resided at Brook, in the county of Hants, near the premises of the prosecutor from which the property was stolen. They were both, in company with others, at a public house, at eleven o'clock on the night the turkeys were so stolen, and at eight o'clock the following morning they were seen together ten miles from Brook, on the road from that place to Salisbury, with a horse and cart belonging to Dovey. The same day Dovey sold two of the turkeys at Salisbury, and the other prisoner, Elizabeth Gray, who resided at Salisbury, was proved to have disposed of the remaining ten at Salisbury on the same day.

" The prisoner, Dovey, made a statement, which was received in evidence, that he was called up at two o'clock A. M. in the night on which the turkeys were stolen, by Hodder, who brought the turkeys to him in a sack, and that he took them to Salisbury and sold them for Hodder.

(*a*) The indictment was in the usual form.

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“The jury returned a verdict of guilty against both prisoners on the second count, for receiving.

“It was objected, by Counsel for Elizabeth Gray, citing *R. v. Messingham*, R. & M. 257, that the prisoner could not be convicted, inasmuch as the indictment charged a joint receiving, whereas the evidence showed separate acts of receiving, and at the suggestion of Counsel, I then put it to the jury whether they found a joint or separate receiving, upon which they returned the following verdict:

“‘We find that William Dovey received on the road between Brook and Salisbury, and Elizabeth Gray at Salisbury. The prisoners were not together at the time.’

“Sentence of imprisonment was passed on both prisoners, and execution respited. Elizabeth Gray was admitted to bail, and William Dovey was remanded to prison until the question on his conviction shall have been decided.

“The opinion of the Court of Appeal is prayed whether, upon this verdict, the judgment given ought to be received in favour of both or either of the prisoners.

“T. R. THRESHER,
“Chairman.”

Saunders, C. for the prisoner Elizabeth Gray.—The question here is, whether upon a count for jointly receiving you can convict a party of a separate receiving (*a*). In *Rex v. Messingham* (*b*), the mother and son were indicted

(*a*) *Saunders, C.*—Another objection is, that there is no venue laid.

Jervis, C. J.—We can only look to the case reserved for us.

Saunders, C.—But there is this difficulty, it shows no jurisdiction. There was a similar case lately before this Court: *Reg. v. Martin*, (*ante*, p. 78). The attention of the Court below was not called to this point.

Cresswell, J.—The evidence shows that the offence was committed within the jurisdiction.

Jervis, C. J.—The Court is but of one opinion; you must confine yourself to the objection reserved.

(*b*) *Ry. & Moo. C. C. 257.*

for jointly receiving ; it appeared that the son received the goods from the thief, and the mother, in a subsequent part of the day, received the goods from the son ; and it was held that the mother could not be convicted upon an indictment for jointly receiving with the son. That case is precisely in point.

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No counsel appeared for the Crown.

JERVIS, C. J.—We think that case clearly establishes that you cannot find several persons guilty of distinct felonies on one count of the same indictment. The felonies here being distinct, it appears therefore that one of the parties was improperly convicted. The count was satisfied by the first conviction, that of the first receiver, Dovey, and Elizabeth Gray ought to have been acquitted.

Conviction reversed.

See *Reg. v. Archer*, Ry. & M. ; 1 Rus. on Cri. 19.

THE QUEEN *against* MARY ANN MEARS AND AMELIA CHALK.

1851.

*Saturday,
January 18.*

CONSPIRACY TO PROCURE DEFILEMENT.

A conspiracy to induce a young woman to submit her body to defilement is an indictable offence.

“THE prisoners, Mary Ann Mears, and Amelia Chalk were tried at the Epiphany Sessions for the town and county of the town of Southampton, held on the 7th January, 1851, before Edward Smirke, Recorder, upon the following indictment, to which they pleaded Not Guilty:—

“Borough, town, and county of the town of Southampton, to wit.—The jurors for our Lady the Queen, upon their oath and affirmation, present, that Mary Ann Mears, late of the parish of St. Mary in the town and county of the town aforesaid, single woman, being a person of wicked and depraved mind and disposition, and contriving, and craftily and deceitfully intending to debauch and corrupt the morals of one Johanna Carroll, as hereinafter mentioned, and to seduce her into an infamous and wicked course of life, heretofore and after the passing of a certain Act of Parliament for the better preventing the heinous offence of procuring the defiling of women, to wit, on the fourteenth day of November, in the year of our Lord one thousand eight hundred and fifty, with force and arms at the parish aforesaid, in the town and county aforesaid, did knowingly, deceitfully, and unlawfully attempt and endeavour, as much as in her lay, to procure the said Johanna Carroll, then and there being a child under the age of twenty-one years, to wit, of the age of fifteen years, an orphan and a servant out of place, to have illicit carnal connection with a man, to wit, a certain man whose name is to the jurors aforesaid unknown, by then and there knowingly and unlawfully, falsely and fraudulently pretending and repre-

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senting to the said Johanna Carroll that she the said Mary Ann Mears was the friend of the said Johanna Carroll, and knew her father and mother, and that if she the said Johanna Carroll would go home with her the said Mary Ann Mears, she the said Mary Ann Mears would keep her until she the said Johanna Carroll could get a place, and that she the said Mary Ann Mears would herself try all she could to get her a place. And by then and there, under such false and fraudulent pretences and representations, taking her the said Johanna Carroll to the house of the said Mary Ann Mears, and keeping her there for a long space of time, and soliciting her and trying to induce her then and there to have illicit carnal connection with the said man. Whereas in truth and in fact the said Mary Ann Mears did not intend to take and did not take the said Johanna Carroll home with her to keep the said Johanna Carroll till she the said Johanna Carroll could get a place, or till she the said Mary Ann Mears could obtain a place for her, but craftily and subtilely, with the wicked design and purpose, by the said false and fraudulent pretences, representations and means aforesaid, to procure the said Johanna Carroll to have connection with a man, as aforesaid, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath and affirmation aforesaid, do further present, that Amelia Chalk, late of the parish aforesaid, in the town and county aforesaid, labourer, at the time of the committing of the said misdemeanour by the said Mary Ann Mears, as aforesaid, to wit, on the day and year aforesaid, in the parish aforesaid, in the town and county aforesaid, the said Mary Ann Mears to do and commit the said misdemeanour, wickedly, knowingly, and unlawfully did aid, abet, and assist, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her

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crown and dignity. And the jurors aforesaid, upon their oath and affirmation aforesaid, do further present, that the said Mary Ann Mears and Amelia Chalk, afterwards, to wit, on the day and year last aforesaid, with force and arms at the parish aforesaid, in the town and county aforesaid, wickedly, designedly, and unlawfully did attempt and endeavour by false pretences, false representations, and other fraudulent means, to procure the said Johanna Carroll, then being a child under the age of twenty-one years, to wit, of the age of fifteen years, to have illicit carnal connection with a man, to wit, a certain man whose name is to the jurors aforesaid unknown, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath and affirmation aforesaid, do further present that the said Mary Ann Mears and the said Amelia Chalk, afterwards, to wit, on the day and year aforesaid, with force and arms at the parish aforesaid, in the town and county aforesaid, did between themselves conspire, combine, confederate, and agree together, wickedly, knowingly, and designedly to procure by false pretences, false representations, and other fraudulent means, the said Johanna Carroll then being a poor child under the age of twenty-one years, to wit, of the age of fifteen years, to have illicit carnal connection with a man, to wit, a certain man, whose name is to the jurors aforesaid unknown, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

“The following was the case proved in evidence in support of the indictment, so far as is material to the questions reserved.

“The prosecutrix, Johanna Carroll, a girl aged fifteen, whose father and mother had been dead for two years and

upwards, had been put out to service by the guardians of the poor, within the town and county of the town of Southampton. On Monday, the 18th November last, she left her last place, and not having got another, she applied to the landlord of a public house at Southampton, for a bed for that night. The landlord was unknown to her when she applied; the prisoner Chalk was present, and the prisoner Mears joined them shortly afterwards. The landlord said he could not give her a bed that night, but referred her to Mrs. Mears, who said she would let her have a bed sooner than let her sleep out.

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“The prisoners were at this time living in the same house in the said town, and had no apparent means of subsistence, except by prostitution and receiving men in the house.

“The two prisoners then took the prosecutrix home. In the course of conversation on their way, and just after they got home, Mears, having learnt from the prosecutrix who she was, and that she wanted to get into service again, told her that she knew her father and mother, and that she would let the prosecutrix remain in her house without paying anything till she could get a place, and that she (Mears) would also try to get one for her.

“The prosecutrix remained some days in the house, looking for a place, and doing household work in the daytime, and sleeping with a little girl at night. Mears gave her food while there. On Tuesday evening the prisoner brought two men to the house, who stayed some time there and drank with them. On Wednesday the two men again came to the house and slept there, each with one of the prisoners.

“On Thursday morning the prisoner Chalk talked to the prosecutrix, and advised her to go out and get money by “going along with men, as she herself did;” but the prosecutrix did not follow her advice. On that day, three

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men came in the afternoon to the house, and after staying a short time went away ; one of them returned later in the evening. Whilst he and the prosecutrix and both prisoners were together in a room of the house, the man (who was unknown to the prosecutrix) called Mears out for a few minutes ; in their absence, the prisoner Chalk told the prosecutrix, that they had perhaps gone out to talk about her (the prosecutrix), and to ask the man whether she and the man would go into the bedroom together. On the return of Mears and the man, Mears called her aside, and asked her whether she had any objection to go into the bedroom with the man : the prosecutrix refused, on which Mears said to her, that it was the best way of getting a living. Chalk also urged her to go with the man, and Mears told her she would get some money from him if she did so. The prosecutrix persisted in refusing ; and the man, after drinking with the women, left the house late at night. Mears then abused the prosecutrix ; charged her with being sly, called her offensive names, and said if she wanted to get her living, she must get it as she did—if she bided with her ; and she threatened to turn her out without her clothes. The prosecutrix said she would go then, but Mears said she should stay till next morning.

“ On Friday, a child of the prisoner Chalk, who was lying dead in the house, was buried. Early on Saturday, the prosecutrix left the house without being allowed to take back her clothes ; and, having no friends or relations to go to, returned to the workhouse. The prisoners, or one of them, had pawned part of the clothes, and Mears claimed to keep the rest to pay for the prosecutrix’s lodging, but eventually delivered them up to the inspector of police, who had been sent to demand them. The prosecutrix had no knowledge of the course of life followed by the prisoners till the third day, but she owned that she suspected it on the second.

“ There was no proof that the prisoners, or either of them, ever knew the parents of the prosecutrix ; or that they, or either of them, ever tried to get any place as a servant for her.

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“ Several witnesses, to prove the girl Carroll's previous habits and good character, and other circumstances, were called for the prosecution.

“ The prisoners offered no evidence, and made no statement in defence, nor were they defended by counsel.

“ The above facts were left to the jury, as evidence under all the counts ; and the jury were told that they could not find *both* prisoners guilty under the first or second counts ; nor *either* of them guilty under the last ; unless they believed that they acted in concert, and with the common object of procuring the illicit connection alleged in the indictment, by the false pretences and representations, or the fraudulent means charged.

“ The jury found both guilty on all the counts. The Recorder passed sentence of imprisonment of twelve calendar months on each, but respited execution until the decision of the Court upon the following questions, which he thought proper to reserve, namely,—

“ 1st, Whether the above-stated facts were evidence to go to the jury on all or any of the counts ?

“ 2nd, Whether the counts, or any of them, disclose an indictable offence, and are valid in point of law ?

“ The prisoners were committed to prison for want of bail.

“ EDWARD SMIRKE.”

Saunders, C. for the Crown.—This indictment was framed under the statute 12 & 13 Vict. c. 76 (a). Look-

(a) Intituled “ An Act to protect Women from Fraudulent Practices for procuring their Defilement : ” the first section enacts, that “ For the better preventing the heinous offence of procuring the defiling of women which

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ing at the object of the statute, the words employed were obviously intended to embrace every fraud practised upon a young female, with a view to procuring her defilement. It was however argued, that, in order to support an indictment upon the statute, it was necessary that a defilement should have taken place, and that this case therefore was not within the meaning of the statute. It was however to be observed, that connection did not take place, only because of the resistance of the girl herself. Upon an indictment under this statute, it is sufficient if fraud be proved either in the representations or the acts of the parties. Here the parties, by a false pretence, induce the girl to go into a house of a disreputable character—their object being, to submit her to the embraces of men. The first two counts were good upon the intent. The last count was for conspiring together. He apprehended this was itself sufficient, and rendered it perhaps unnecessary that he should argue whether the offences laid in the other two counts were within the statute.

JERVIS, C. J.—The Court are of opinion, that a conspiracy to solicit a woman is an indictable offence. There is a case in Burrows's Reports, p. 1434 (a), precisely in

certain infamous persons do most wickedly practise; be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present Parliament assembled, and by the authority of the same, That if any person shall, by false pretences, false representations, or other fraudulent means, procure any woman or child under the age of twenty-one years to have illicit carnal connection with any man, such person shall be guilty of a misdemeanour, and shall, being duly convicted thereof, suffer imprisonment for a term not exceeding two years, with hard labour." There are two other sections in the statute providing for the payment of costs.

(a) In that case Anne Catley, seventeen years of age, having been apprenticed to Bates, a music master, Bates assigned her, so far as he could, to Sir Francis Delaval *to learn music*: a rule for an information was exhibited against Bates, Delaval, and Fraine, an attorney, who drew and prepared the assignment, &c.; and it appearing that they all knew that she was assigned for the purpose of prostitution, the rule was made absolute against all three

point. There are also other cases which I need not refer to.

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Conviction affirmed.

for an unlawful combination and conspiracy. Lord Mansfield, C. J., said, "I remember a cause in the Court of Chancery wherein it appeared that a man had *formally assigned his wife over to another man*, and Lord Hardwicke directed a prosecution for that transaction, as being notoriously and grossly *against public decency and good manners*." See stat. 4 & 5 Phil. & M. c. 8; and 4 Mod. 145, n. (*d*); *Reg. v. Meadows*, 1 Car. & K. 399; *Reg. v. Robins*, 1 Car. & K. 456; 1 East, P. C. c. 11.

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Saturday,
January 18.THE QUEEN *against* EDWARD AMOS.*Case moved by the Honourable Justice Tolfourd.*

A. (formerly in the army) was in the habit of employing his capital in building houses upon his own land for his profit and gain. He had erected a closed-in and boarded building, twenty-four feet square, with slated roof and glass windows; it was called "the workshop," and was used as a place of deposit for tools and building materials.

Held that this was a "*shed*" within the meaning of the statute 7 & 8 Vict. c. 62.

Qu. A "warehouse," a "shop," a "building used for carrying on a certain trade;" i. e. "the trade of a builder," within the stat. 7 Will. IV. & 1 Vict. c. 89, s. 3.

ARSON.

"THE prisoner was tried before me, at the last Sessions of the Central Criminal Court, for arson. The building which he was charged with burning was described in one count of the indictment as a 'warehouse;' in the second, as an 'office;' in a third, as a 'shop;' in a fourth, as a 'shed;' and in a fifth, as 'a building used for carrying on a certain trade;' that is to say, the trade of a builder.

"The building destroyed by fire stood on premises belonging to a gentleman who had been in the army, and was styled 'Captain Ross' at Clapham. Possessing a considerable freehold estate there, he employed his capital in building houses thereupon, of which from twenty to thirty were in the course of erection, himself providing the materials and superintending the work, which was performed by persons, sometimes under contracts with him, and sometimes directly employed by him; but always with his own materials. His object was to let the premises, or sell and convey them as he could find purchasers. The building was erected by him four or five years ago for the convenience of the works; it was twenty-four or twenty-five feet square, its sides of wood with glass windows, its roof slated, and it was commonly called the 'workshop.' It was used as a store-house for seasoned timber, as a place of deposit of tools, and a place where timber was worked up into proper forms, and prepared for use.

"At the time of the fire this building contained timber prepared for use, which being burnt with it made the owner's loss amount to more than 1000*l*.

“ On the part of the prisoner, it was contended that the building destroyed did not answer either of the descriptions of ‘ warehouse,’ ‘ office,’ ‘ shop,’ or ‘ shed ;’ and that the use of it by Captain Ross was not a use in the trade of a builder.

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“ The jury found the prisoner guilty, and, in answer to a question put by me to them, found that Captain Ross had been, and was at the time of the fire, in the habit of employing his capital in the building of houses on his own land, and of purchasing and working up timber and other materials in their erection, for his profit and gain ; and that the building destroyed was, at the time of the fire, employed by him on the purposes of such object.

“ I respited the judgment and reserved the question, whether the building destroyed answers the description in either count of the indictment, for the opinion of the Judges of the Court of Criminal Appeal.

“ J. N. TALFOURD.

“ 16th January, 1851.”

Pulling, for the prisoner (*a*).—After the jury had, on this trial, performed their duty by finding the issue joined between the parties, another special issue was submitted to them which formed no part of the record. They had in their first finding discharged their duty, and it was incompetent for them for the purposes of the trial to give any opinion upon the question subsequently submitted to them. He therefore asked the Court to exclude that part of the case from their consideration. [*Jervis*, C. J.—No ; we must take the case as it stands.] Not one of the counts

(*a*) Garde, for the Crown, complained that the word “ erection ” had been left out of the case.

Pulling submitted, the word “ building ” which was inserted probably would be sufficient.

The Court directed that the case should be taken as if the word “ erection ” had been in it. As if the count with that word had been added.

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sufficiently described the building which was burnt down upon the present occasion. The building is described as “a building used for carrying on a certain trade;” that is to say, the trade of a builder. The jury find that Captain Ross was in the habit of employing his capital in building houses upon his own land, and of purchasing and using materials in their erection for his profit and gain, and that the building was employed by him for the purposes of such object. He submitted that upon this finding it did not appear that Captain Ross carried on the trade of a builder within the meaning of the Act of Parliament. [*Jervis*, C. J.—Does the question turn upon his building upon his own freehold property? Would leasehold do?] He submitted it would not. [*Jervis*, C. J.—Then what are Mr. Cubitt’s buildings? Is Captain Ross the less a builder because he has once been in the army?] *Stuart v. Sloper* (a). [*Jervis*, C. J.—That is not at all this case. There the party hired the land and employed a builder: here the party builds himself, himself employing the labourers.] Can it be said that any noble lord who builds upon his own estate in the neighbourhood of London, and sells the houses if he can, is a builder? There is no distinction between the man who directs the building himself, and the man who allows another to superintend the works for him. Under this count it must appear that he carried on the trade of a builder; that is, that he was prepared to build any erection anywhere, for any person who might be disposed to employ him, and would pay him for it. Looking at the Act of Parliament, the Court would not construe this place as being within its meaning. [*Erle*, J.—You would press upon us that the legislature intended to leave the buildings of private persons, that is, of all those who were not within the operation of the bankrupt law, to be burnt with im-

(a) 18 L. J., Exch. 321.

punity.] He submitted that the word “trade” must have a substantive and definite meaning; it was a term well known to the law, and could not be extended in the construction of a highly penal statute.

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The next objection was, that it was not a “warehouse.” A warehouse is described by Johnson as a storehouse of merchandize. Under an old Act of Parliament, “warehouse” was said not to mean a repository for goods, but a place where a tradesman keeps his goods for sale—a place in the nature of a shop; *Rex v. Godfrey* (a). A warehouse is not a place for stowing goods,—it is not merely a place for depositing merchandize; it is not a storehouse. [*Martin*, B.—Richardson describes a warehouse as a place for the safe custody of goods.] So long as the articles placed there are intended for sale, it is a warehouse, and no longer. In *Reg. v. Hill* (b), it was held that a cellar used merely for the deposit of goods intended for removal and sale, was a warehouse within the stat. 7 & 8 Geo. IV. c. 29, s. 15 (c); but in this case it is clear that there were neither goods nor merchandize intended for sale. [*Jervis*, C. J.—What do you say to the word “shed?”] That word is taken from an Act of Parliament (d), the title of which is, “An Act to amend the Law as to Burning Farm Buildings,” and is confined to a shed used in farming land. [*Cresswell*, J.—The words of the statute are, shall “set fire to any hovel, shed, or fold, or to any farm building;” it does not say any *other* farm building, and therefore we need not read the word “shed” as a farm building.] The word “shed” is so wide an expression, that it has

(a) 1 Leach, 287.

(b) 2 Moo. & R. 458.

(c) The statute against breaking and entering. In that case Rolfe, B., said, “That a warehouse in common parlance certainly meant a place where a man stowed or kept his goods which were not immediately wanted for sale, and there was no reason to suppose that the legislature used the term in that statute in a sense repugnant to its ordinary meaning.

(d) 7 & 8 Vict. c. 62.

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ceased to have any individual or absolute definition at all. Johnson says it is supposed to be derived from shade, and defines it to be "a slight temporary covering." Under that definition a large umbrella fixed in the ground, might be included under a "shed" or "shade" (a). Upon the evidence this appeared to be a building twenty-five feet square, with sides of wood, and closed windows, and was commonly called the "workshop." [*Jervis*, C. J.—What do you call this place?] He would refer to *Reg. v. Munson* (b), where Coleridge, J., in speaking of a certain building, was unable to describe it. That was a part separated by a wall from the rest of a building, which had been originally used as a stable. He could not apply any particular name to this place. He should say that a shed was a place wherein to seek refuge from the weather, and where a person could have ingress and egress; open at least at one side, or at the end; when that opening is closed, it loses its character of a "shed." It was not a shop. *Reg. v. Saunders* (c) lays down, that a shop must be a place for the sale of goods, and not a mere workshop. It was not an office. It would not be contended that it was used as an office. He submitted therefore, there was no count in this indictment, upon which the prisoner could be convicted.

Garde, for the Crown, was not called upon.

JERVIS, C. J.—It is unnecessary for the Court to express any opinion whether the building is sufficiently described in each of the counts; it is enough that it is sufficiently described in one count; the Court confines its judgment to that one count, and it is not to be taken as expressing any opinion upon the others. We think that the word "shed" is a sufficient description within the statute. It has been said that the word "shed" is confined to farm

(a) He here referred to Jonah, chap. iv. ver. 5, and to Milton's *Paradise Regained*, book ii. ver. 2.

(b) 2 Cox, C. C. 186

(c) 9 Car. & P. 79.

buildings ; we are not of that opinion. We therefore think the conviction is right.

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PATTERSON, J.—This certainly is a shed ; that it is a temporary building is manifest from the case ; it is a place used merely for the purpose of stowing away goods. It is not the less a shed because it is closed in. There are many places called sheds, which are very firmly built.

CRESSWELL, J., ERLE, J., and MARTIN, B., concurred.

Conviction affirmed.

Case reserved by the Honourable Baron Martin.

THE QUEEN *against* FREDERICK AUGUSTUS DAWSON.

1851.

*Saturday,
January 18.*

FORGERY.

A bill of parcels underwritten, "I hope you will excuse me for sending for such a trifle," &c., and purporting to be signed by the party to whom the money was due, and presented to the debtor, is a "warrant," and (*semble*) also an "order" within the meaning of the statute 11 Geo. IV. & 1 Will. IV. c. 66, s. 3.

"AT the Session of Gaol Delivery, holden for the jurisdiction of the Central Criminal Court in November last, Frederick Augustus Dawson was tried before me upon an indictment founded on the stat. 11 Geo. IV. & 1 Will. IV. c. 66, s. 3, charging him with forging and uttering the document hereinafter set forth, (and which was described in some counts as an order, and in others as a warrant for the payment of nine shillings,) with intent to defraud John Lowe. The forged document was in the following form:—

" ' Mr. Lowe,

" ' London.

" ' Bought of C. Dawson, English and foreign fruit merchant, and potatoe salesman, two bushels of apples, 9s.'

" ' November 9th.'

" ' SIR,—I hope you will excuse me for sending for such a trifle, but I have received a lawyer's letter this morning, and, unless I can make up a certain amount by *one* o'clock, there will be an action commenced against me, and I am obliged to hunt after every shilling.

" ' Yours, &c.

" ' F. Dawson.'

"It appeared upon the trial that Mr. John Lowe, to whom the document was directed, was indebted to Mrs. Frances Dawson, by whom it purported to be signed, and who carried on business in the name of C. Dawson, in the sum of nine shillings, for two bushels of apples. That the document was forged and uttered by the prisoner to Mr. Lowe, as a genuine instrument coming from Mrs. Dawson,

with the intention of fraudulently obtaining from Mr. Lowe the said sum of nine shillings.

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“The facts necessary to establish the case were clear, but it was objected on the part of the defendant that the document was neither an order nor a warrant within the meaning of the above section of the said statute.

“I directed the jury to consider whether the prisoner was guilty of forging and uttering the document with the fraudulent intention of obtaining from Mr. Lowe the sum of nine shillings and appropriating it to himself.

“The jury thereupon found the prisoner guilty.

“But, doubting whether such document was an order or a warrant, within the above section, I respited judgment upon the indictment, and remanded the prisoner to the gaol of Newgate, until, and in order that, I should have the opinion of her Majesty’s Justices and Barons, under the Act of 11 & 12 Vict. c. 78, upon a case to be stated, whether the document in question was, under the circumstances, such an order or warrant; and I request the opinion of the said Justices and Barons upon the foregoing case.

“December 7th, 1850.

SAMUEL MARTIN.”

Ribton, for the prisoner.—The instrument is not a warrant, nor is it an order, as described. The true construction of a warrant is this:—that the party drawing the warrant has an authority to draw it, but that the party on whom it is drawn is not bound to pay it, *Reg. v. Vivian (a)*. [*Jervis*, C. J.—That is one definition of a warrant.] He apprehended it was the only good definition. [*Jervis*, C. J.—I do not know that.] He referred to the observations of Alderson, B., in *Reg. v. Illidge (b)*. An order must be obeyed: a warrant need not be obeyed; but, if obeyed, it is a sufficient indemnification to the party paying; *Reg. v. Thorn (c)*. The document must on the

(a) 1 Car. & K. 721.

(b) *Ante*, p. 137.

(c) 2 Moo. C. C. 210.

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face of it, show that it is an order, *Reg. v. Vivian*. [*Cresswell*, J.—Do you mean to contend that nothing can be a warrant for the payment of money, unless the party paying it can recover the amount upon the document? If so, no warrant can go to a debtor.] The production of the document itself would not be evidence of payment, and therefore it is no warrant, being no indemnity to the party paying. It is not like a receipt, which indemnifies the party paying. The necessary ingredients of an order are, that it must be drawn by a person having authority to draw, and be addressed to a person who is bound to pay it. According to that definition, this is not an order. This is a simple request to a party to do that which he is not bound to do, and therefore is not an offence indictable under the statute.

No Counsel appeared for the Crown.

JERVIS, C. J.—If this had been a genuine document, and the party had paid it, and had been again requested on the following day to pay the amount over again, he would have been justified in refusing to do so. It was therefore a warrant. I also think it was an order.

CRESSWELL, J.—I should be sorry to convey any doubt that this was an order as well as a warrant.

PATTESON, J., ERLE, J., MARTIN, B., concurred.

Conviction affirmed.

At the March Sessions at the Central Criminal Court, Erle, J., decided that the following were not, nor was either of them, a warrant or an order within the meaning of the statute.

Reg. v. Harold.

“Dear Sister,—Please to lend me the sum of 1*l.* as I have not enough to pay my duty, and it must be paid by two o’clock; by so doing it will greatly oblige. Send it by the bearer, as I am waiting in Broad Street.

“From your Brother,

“J. DAVIS.”

[In this case it did not appear whether any money was owing.]

Reg. v. Manders.

“Dear Sir,—I shall be very thankful to you if you will send me the small sum of 30*s.*

Yours truly,

J. MACHIN.”

[In this case there was no money owing.]

SITTINGS AFTER HILARY TERM.

THE FOURTEENTH YEAR OF THE REIGN OF VICTORIA.

CORAM

JERVIS, C. J.,
ALDERSON, B.,WILLIAMS, J.,
PLATT, B.

MARTIN, B.

—◆—

THE QUEEN *against* GEORGE REID, WILLIAM ACKROYD,
and WILLIAM ROTHWELL.

Case reserved by the Honourable Baron Martin.

ASSAULT WITH INTENT.

1851.
Saturday,
Feb. 8.

“ At the York Winter Assizes, the prisoners were tried on the following indictment :—

“ Yorkshire, to wit.—The jurors for our Lady the Queen upon their oath present, that George Reid, late of the parish of Doncaster, in the county of York, labourer, William Ackroyd, late of the same parish, labourer, and William Rothwell, late of the same parish, labourer, on the eighteenth day of September, in the year of our Lord one thousand eight hundred and fifty, with force and arms at the parish aforesaid, in the county aforesaid, in and upon George Smith, in the peace of God and of our said Lady the Queen then and there being, feloniously did make an assault, and him the said George Smith, in bodily fear and danger of his life then and there feloniously did put, and

The prisoner was indicted for a felonious assault and robbery. Held, that he could not be convicted of an assault *with intent to rob.*

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two pieces of current silver coin of the realm, called shillings, two pieces of current silver coin of the realm, called sixpences, and one silk handkerchief, of the value of two shillings, of the moneys, goods and chattels of the said George Smith, from the person and against the will of the said George Smith, then and there feloniously and violently did rob, steal, take and carry away. And that the said George Reid, William Ackroyd, and William Rothwell, immediately before, at the time of, and also immediately after such robbery as aforesaid, did then and there feloniously beat and strike, and use other personal violence to the said George Smith, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

“The jury found that the prisoners were guilty of assaulting and beating George Smith (the person named in the indictment), with intent to rob him.

“It was objected by the Counsel for the prisoners, that upon this finding, the prisoners were entitled to a verdict of Not Guilty being entered for them.

“I thought not, and that it was lawful to proceed to judgment against the prisoners; but at the request of their Counsel, and with the concurrence of the Counsel for the prosecutor, I respited the judgment until the next Assizes, in order that the judgment of the Judges of either bench, and of the Barons of the Exchequer might be obtained; which judgment I request may be given.

“SAMUEL MARTIN.

“December 21st, 1850.”

Overend, for the prisoners Reid and Rothwell.—The verdict pronounced by the jury was a verdict of Not Guilty. It was impossible at common law, or by statute, to find a verdict like this. In the indictment the charge is, that the

prisoners assaulted the prosecutor, and then robbed him. There was no charge of an assault, *with intent* to rob. An intent to commit a robbery is a creature of the statute. Before the statute no such offence was known at common law. On a charge of murder, there is no doubt that a man may be found guilty of manslaughter, because it is involved in the greater offence; and in burglary, the breaking in with intent to steal, and with stealing, are the same offence by statute. So there are cases where, a party being indicted for a felony, the jury may acquit of the felony, and find guilty of a common assault; but they cannot find the party guilty of another and different felony—of a statutable offence. Here the indictment did not contain any averment, which warranted the jury in finding the prisoner guilty of such an offence; nor can it be said, that the offence charged included the offence found by the jury. With respect to the statute 7 Will. IV. & 1 Vict. c. 85, s. 11, the word “assault” in that statute must be read as if written “common assault.” It cannot be said that an assault with intent to rob, is an aggravated misdemeanour, because the statute makes it a felony. There is no such thing as a *felonious assault, qua assault*. [*Martin, B.*—In this indictment is stated a felonious assault, and the jury find a felonious assault. What is the meaning of the statute? Is it not, that a party may be found guilty of an assault, felonious or otherwise; not confining it to a common assault? Why may not a party charged with a robbery, be found guilty of an aggravated assault?] Because the aggravated assault is a felony, which the statute does not enable the jury to find him guilty of. The word felonious might be rejected altogether as surplusage—it has no effect in itself: the assault committed must be stated, for it is that which constitutes the felony. He might have been found guilty of stealing from the person, because robbery is an aggravation of the stealing; but this is a distinct

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1851. offence by statute. He cited *Reg. v. Vandercomb* (a),
Reg. v. Watkins (b), *Rex v. Withal* (c), *Anonymous* (d).

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Dearsly, for the prisoner Ackroyd.—If the count contained more than one charge, it was bad for duplicity; if it did not, it must be taken to charge a robbery, including an assault. Taking it to be so, the jury acquit the prisoner of the robbery—of that which is charged in the indictment—and find him guilty,—not of an assault involved in the robbery,—not of a misdemeanour under the statute,—but of an aggravated and statutable offence, not laid in the indictment. If this could be, then on an indictment for burglary, a man might be convicted of murder.

Hall, for the Crown.—This is a valid conviction at common law. The statute, giving authority to convict of an assault, does not limit the assault to a misdemeanour; the jury may find their verdict for the assault, and that it was attended with circumstances of aggravation, even though there should be a statute under which, if the assault be attended with such circumstances, it is made a felony. A charge of robbery must include a charge of an attempt to rob; for without the attempt, the robbery could not take place: and the statute empowers the jury, if they acquit the prisoner of the felony charged, to find him guilty of *any* assault, which is included within the felony. The statute makes no distinction between assaults which are, and those which are not felonious. He cited *Reg. v. Gould* (e), *Reg. v. Neale* (f), *Reg. v. Huxley* (g). If the Court should not be of this opinion, he submitted that the words “with intent to rob him,” included in the verdict, might be struck out as unimportant: they were an

(a) 2 Leach, C. C. 708, 4th ed.; East, P. C. 519, S. C.

(b) Car. & M. 264.

(c) East, P. C. 517.

(d) 2 Moo. C. C. 40.

(e) 9 Car. & P. 364.

(f) 1 Den. C. C. 36.

(g) Car. & M. 596.

unnecessary addition to the finding. He cited also, *Campbell v. The Queen* (h), *Reg. v. Walker* (i).

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 REID.

JERVIS, C. J.—We are of opinion, that the finding of the jury does not justify a conviction upon this indictment, and that the judgment must therefore be arrested. It is said that the finding of the jury is a finding of a felony, technically included in the indictment, and that therefore the prisoners might properly be convicted at common law. I do not think this is a correct view of the matter. In order to do that, the minor felony must be substantially charged in the indictment; as upon an indictment for burglary, the offence of housebreaking is included, and, generally speaking, a larceny also, and a prisoner may be found guilty of either of those offences; but upon an indictment for burglary, and breaking and entering a house and stealing, the prisoner cannot be found guilty of breaking and entering, with intent to steal. (*Vandercomb's case*.) Here the jury have negatived the whole of the indictment, except the assault. It is said, the word “rob” includes an attempt to rob. I do not think so; but at all events, the expression “rob the goods,” is not very correct; and the inaccurate use of the word does not warrant the Court in giving that construction which is contended for. We think that this conviction cannot be sustained at common law, because the felony which the jury have found, is not charged in the indictment. If that be so, can the prisoner be convicted under the statute? The statute says, “that upon the trial of every offence which includes an assault, if the party charged is acquitted of the felony, he may be convicted of assault.” That does not mean in every case, where upon the face of the indictment an assault shall be alleged, but where an assault is legally and technically included in the offence charged. Here the offence does include an assault,

(h) 2 Cox, C. C. 463.

(i) 2 Moo. & R. 446.

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and the jury might, under the statute, find the prisoners guilty of an assault—that is, of an offence, which has all the legal incidents of an assault; but, they have found them guilty of an assault *with intent to rob*—an offence made felony by statute, and one not charged in the present indictment. Such a finding not being warranted, is equivalent to no finding at all; and the conviction is therefore bad.

Conviction reversed.

CORAM

LORD CAMPBELL, C. J.,
 JERVIS, C. J.,
 POLLOCK, C. B.,
 PARKE, B.,
 ALDERSON, B.,
 PATTESON, J.,
 COLERIDGE, J.,

MAULE, J.,
 WIGHTMAN, J.,
 CRESSWELL, J.,
 ERLE, J.,
 WILLIAMS, J.,
 TALFOURD, J.,
 MARTIN, B.

THE QUEEN *against* ROBERT COURTICE BIRD AND SARAH BIRD.

FELONY INCLUDING ASSAULT.

1851.

Wednesday,
 Feb. 12 (a).

“THE prisoners were indicted for having, on the 10th of November, 1849, assaulted Mary Ann Parsons with intent to wound, and with intent, by such wounding, to do her grievous bodily harm.

“The prisoners pleaded that they had been before acquitted of the offence charged.

“The plea set out an indictment for murder, the first count of which charged the murder of Mary Ann Parsons by striking, on the fifth of November, 1849, with a stick on

Two prisoners were indicted for murder. The jury negatived that the assaults, or any one or more of them laid and proved against the prisoners, or either of them, conduced to the death. Held, that the prisoners could

not upon that indictment be convicted of an assault, under the statute 7 W. IV. & 1 Vict. c. 58, s. 11, by *Pollock*, C. B., p. 537, *Patteson*, J., p. 515, *Coleridge*, J., p. 508, *Wightman*, J., p. 500, *Cresswell*, J., p. 496, *Erle*, J., p. 493, *Williams*, J., p. 486, and *Talfourd*, J., p. 476; dissenting, *Lord Campbell*, C. J., p. 547, *Jervis*, C. J., p. 541, *Parke*, B., p. 530, *Alderson*, B., p. 522, *Maule*, J., p. 505, and *Martin*, B., p. 467.

That therefore, upon a subsequent indictment for the same assaults, [as assaults,] the prisoners could not plead *autrefois acquit*.

(a) This case was first argued in Michaelmas Term, 1850, on Wednesday, November 20th, and Friday, November 22nd, before Pollock, C. B., Wightman, J., Williams, J., Talfourd, J., and Martin, B.; on Friday, December 20th, Pollock, C. B., said that there was a difference of opinion amongst the Judges constituting the Court upon that argument, and that the case would therefore be referred to the consideration of a larger number of the Judges. It was afterwards, in Hilary Term, 1851, on Saturday, January 25th, argued before the above-named fourteen Judges, who gave their judgment on Wednesday, February 12th.

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the head, chest, shoulders, back, arms, legs, and thighs, causing divers mortal bruises, of which she died on the 4th of January, 1850 (a).

“2nd count alleged the mortal bruises to have been caused by divers beatings between 5th November and 1st of January.

“3rd count alleged beatings on 5th November, 1st December, and 1st January, and divers other days between 5th November and 1st January.

(a) The plea and replication were as follows :—

And the said Robert Courtice Bird and the said Sarah the said wife of the said Robert Courtice Bird in their own proper persons now come into Court here and having heard the said indictment read and the matters therein contained say that they ought not to be put to answer the said indictment they having been heretofore in due manner of law acquitted of the premises in and by the said indictment above specified and charged upon them and for a plea to the said indictment they say that our said Lady the Queen ought not further to prosecute the said indictment against them because they say that heretofore to wit at the assizes and general sessions of oyer and terminer and general delivery of the gaol of our Lady the Queen holden at the castle of Exeter in and for the county of Devon on Saturday the sixteenth day of March in the thirteenth year of the reign of our sovereign Lady Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith before Sir William Erle knight one of the Justices of our Lady the Queen assigned to hold pleas before the Queen herself Sir Thomas Noon Talfourd knight one of the Justices of our Lady the Queen of her Court of Common Pleas and others their fellow Justices of our Lady the Queen assigned by letters patent of our said Lady the Queen under the Great Seal of the United Kingdom of Great Britain and Ireland to them the said Sir William Erle and Sir Thomas Noon Talfourd and others their fellows Justices of our said Lady the Queen and to any two or more of them directed (of whom one of them the said Sir William Erle and Sir Thomas Noon Talfourd or of others in the said letters patent named our said Lady the Queen willed to be one) they the said Robert Courtice Bird and the said Sarah the said wife of the said Robert Courtice Bird stood indicted and were duly arraigned upon a certain indictment which charged them the said Robert Courtice Bird and the said Sarah the said wife of the said Robert Courtice Bird by the names and descriptions of Robert Courtice Bird late of the parish of Buckland brewer in the county of Devon labourer and Sarah the wife of the said Robert Courtice Bird late of the same parish for that they the said Robert Courtice Bird and the said Sarah the said wife of the said Robert Courtice Bird not having the fear of God before their eyes but being moved and seduced by the instigation of the Devil on the fifth day of November in the year of our Lord 1849 with

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“ 4th count alleged the mortal bruises to have been caused by blows inflicted with a scourge made of leather thongs.

“ 5th count alleged the mortal bruises to have been caused by casting and throwing her against the ground on the 1st of January, 1850.

“ 6th count alleged the mortal bruises to have been caused by throwing her on the ground and there kicking and beating her, on the 1st of January, 1850.

“ It then alleged that the indictment included divers

force and arms at the parish aforesaid in the county aforesaid in and upon one Mary Ann Parsons in the peace of God and our said Lady the Queen then and there being unlawfully feloniously wilfully and of their malice aforethought did make an assault And that the said Robert Courtice Bird and Sarah his wife with a certain stick of the value of a penny which they the said Robert Courtice Bird and Sarah his wife in their right hands then and there had and held the said Mary Ann Parsons in and upon the head chest shoulders back arms legs and thighs of her the said Mary Ann Parsons then and there feloniously wilfully and of their malice aforethought did strike and beat they the said Robert Courtice Bird and Sarah his wife giving to the said Mary Ann Parsons then and there thereby to wit with the stick aforesaid in and upon the head chest shoulders back arms legs and thighs of her the said Mary Ann Parsons divers mortal bruises of which said mortal bruises the said Mary Ann Parsons from the said fifth day of November in the year aforesaid until the fourth day of January in the year of our Lord 1850 at the parish aforesaid in the county aforesaid did languish and languishing did live on which said fourth day of January in the year last aforesaid the said Mary Ann Parsons at the parish aforesaid in the county aforesaid of the said mortal bruises died. And so the said Robert Courtice Bird and Sarah his wife the said Mary Ann Parsons in manner and form aforesaid feloniously wilfully unlawfully and of their malice aforethought did kill and murder against the peace of our Lady the Queen her crown and dignity.

And also for that they the said Robert Courtice Bird and the said Sarah his wife not having the fear of God before their eyes but being moved and seduced by the instigation of the Devil on the fifth day of November in the year of our Lord 1849 and on divers other days and times between that day and the third day of January in the year of our Lord 1850 to wit on the first day of December in the year of our Lord 1849 and the first day of January in the year of our Lord 1850 respectively with force and arms at the parish aforesaid in the county aforesaid in and upon one Mary Anne Parsons in the peace of God and our said Lady the Queen then and there being feloniously wilfully wickedly unlawfully and of their malice aforethought did make divers to wit ten assaults and that the said Robert Courtice Bird and Sarah his wife with a certain stick to wit of the value of one penny which they the said

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assaults against Mary Ann Parsons, and that the prisoners were acquitted upon the said indictment, and that the assaults included in the felony and murder charged upon them in the said indictment were the same as those charged in the present indictment. The replication to this plea averred,

“That the prisoners were not acquitted of the felony and murder including the same identical assaults charged in the present indictment.

Robert Courtice Bird and Sarah his wife in their right hands then and there to wit at the several times aforesaid at the parish aforesaid in the county aforesaid had and held the said Mary Ann Parsons in and upon the head chest shoulders arms legs and thighs of her the said Mary Ann Parsons then and there to wit at the several times aforesaid at the parish aforesaid and county aforesaid feloniously wilfully wickedly unlawfully and of their malice aforethought did strike and beat they the said Robert Courtice Bird and Sarah his wife to the said Mary Ann Parsons then and there thereby to wit with the said stick at the several times aforesaid at the parish aforesaid in the county aforesaid giving to the said Mary Ann Parsons in and upon the head chest shoulders arms legs and thighs of her the said Mary Ann Parsons divers to wit ten mortal bruises of which said mortal bruises the said Mary Ann Parsons from the said fifth day of November in the year aforesaid and the several other days aforesaid until the fourth day of January in the year of our Lord 1850 at the parish aforesaid in the county aforesaid did languish and languishing did live on which said fourth day of January in the year last aforesaid the said Mary Ann Parsons at the parish aforesaid in the county aforesaid of the said mortal bruises died. And so the said Robert Courtice Bird and Sarah his wife the said Mary Ann Parsons in manner and form aforesaid feloniously wilfully unlawfully and wickedly and of their malice aforethought did kill and murder against the peace of our Lady the Queen her crown and dignity.

And also for that they the said Robert Courtice Bird and the said Sarah his wife not having the fear of God before their eyes but being moved and seduced by the instigation of the Devil on the fifth day of November in the year of our Lord 1849 and on divers other days and times between that day and the third day of January in the year of our Lord 1850 to wit on the first day of December in the year of our Lord 1849 and the first day of January in the year of our Lord 1850 respectively with force and arms at the parish aforesaid in the county aforesaid in and upon one Mary Anne Parsons in the peace of God and our said Lady the Queen then and there being feloniously wilfully wickedly and unlawfully and of their malice aforethought did make divers to wit ten assaults and that the said Robert Courtice Bird with a certain stick of the value of one penny which he the said Robert Courtice Bird in his right hand then and there to wit at the several times aforesaid at the parish afore-

“The former record was put in, and it was proved that on the former trial evidence had been given of different assaults committed by the prisoners upon the deceased through the months of November and December. One on the 5th of November, with a stick on the arms and neck. One at the end of November, or beginning of December, with a stick across the shoulders. Another with a furze bush about the 11th of December.

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“The Counsel for the prosecution in opening the case to

said and county aforesaid had and held and the said Sarah the wife of the said Robert Courtice Bird with a certain other stick of the value of one penny which she the said Sarah in her right hand then and there to wit at the several times aforesaid at the parish aforesaid and county aforesaid had and held the said Mary Ann Parsons in and upon the head chest shoulders arms legs and thighs of her the said Mary Ann Parsons then and there to wit at the several times aforesaid at the parish aforesaid and county aforesaid feloniously wilfully wickedly unlawfully and of their malice aforethought did respectively strike and beat they the said Robert Courtice Bird and Sarah his wife respectively to the said Mary Ann Parsons then and there thereby to wit at the several times aforesaid at the parish aforesaid in the county aforesaid with the several sticks aforesaid so held by them respectively as aforesaid at the parish aforesaid in the county aforesaid giving with this that they respectively then and there thereby gave to the said Mary Ann Parsons in and upon the head chest shoulders arms legs and thighs of her the said Mary Ann Parsons divers to wit ten mortal bruises of which said mortal bruises the said Mary Ann Parsons from the said fifth day of November in the year of our Lord aforesaid and the several other days aforesaid until the fourth day of January in the year of our Lord 1850 at the parish aforesaid in the county aforesaid did languish and languishing did live on which said fourth day of January in the year last aforesaid the said Mary Ann Parsons at the parish aforesaid and county aforesaid of the said mortal bruises so given as aforesaid died. And so the said Robert Courtice Bird and Sarah his wife the said Mary Ann Parsons in manner and form aforesaid by the means aforesaid feloniously wilfully unlawfully wickedly and of their malice aforethought did kill and murder against the peace of our Lady the Queen her crown and dignity.

And also for that they the said Robert Courtice Bird and the said Sarah his wife not having the fear of God before their eyes but being moved and seduced by the instigation of the Devil on the fifth day of November in the year of our Lord 1849 and on divers other days and times between that day and the third day of January in the year of our Lord 1850 with force and arms at the parish aforesaid in the county aforesaid in and upon the said Mary Ann Parsons in the peace of God and our said Lady the Queen then and there being feloniously wilfully unlawfully and of their malice aforethought

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the jury on the former trial, had opened these different assaults as conducing to the death ; but stated, that if he should fail in proving that they conduced to the death, they would furnish evidence of the *animus* of the prisoners.

“ It being proved, however, on that trial, as it also was on this, that the death which took place on the 4th of January, was caused exclusively by one particular blow on the head, inflicted shortly before the death of the deceased ; and there being no evidence to show that that

did make divers assaults and that the said Robert Courtice Bird and Sarah his wife with a certain scourge to wit a scourge made of certain leather thongs to a certain stick affixed of the value of a penny which they the said Robert Courtice Bird and Sarah his wife in their right hands then and there to wit at the several times aforesaid at the parish aforesaid and county aforesaid had and held the said Mary Ann Parsons in and upon the head chest shoulders back arms legs and thighs of her the said Mary Ann Parsons then and there feloniously wilfully and of their malice aforethought did strike and beat they the said Robert Courtice Bird and Sarah his wife giving to the said Mary Ann Parsons then and there thereby to wit with the scourge aforesaid at the several times aforesaid at the parish aforesaid in the county aforesaid in and upon the head chest shoulders back arms legs and thighs of her the said Mary Ann Parsons divers mortal bruises of which said mortal bruises the said Mary Ann Parsons from the said fifth day of November and the said other days and times until the said fourth day of January in the year of our Lord 1850 aforesaid at the parish aforesaid in the county aforesaid did languish and languishing did live on which said fourth day of January in the year last aforesaid the said Mary Ann Parsons at the parish aforesaid in the county aforesaid of the said several mortal bruises died. And so the said Robert Courtice Bird and Sarah his wife the said Mary Ann Parsons in manner and form aforesaid by the means aforesaid feloniously wilfully and of their malice aforethought did kill and murder against the peace of our Lady the Queen her crown and dignity.

And also for that they the said Robert Courtice Bird and the said Sarah his wife not having the fear of God before their eyes but being moved and seduced by the instigation of the Devil on the first day of January in the year of our Lord 1850 with force and arms at the parish aforesaid in the county aforesaid in and upon the said Mary Ann Parsons in the peace of God and our Lady the Queen then and there being feloniously wilfully wickedly and unlawfully and of their malice aforethought did make an assault and that the said Robert Courtice Bird with both his hands and the said Sarah Bird with both her hands the said Mary Ann Parsons to and against the ground then and there feloniously wilfully wickedly unlawfully and of their malice aforethought did cast and throw by which said casting and throwing the said

blow had been struck by either of the prisoners, they were acquitted.

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“ It was not shown before me that there were any other assaults committed, but those which had been given in evidence on the former trial.

“ Under these circumstances, the following question of law arose :—Whether the general acquittal pronounced at the former trial, could operate as a bar to a prosecution for each and every of the assaults so given in evidence.

Mary Ann Parsons to and against the ground the said Robert Courtice Bird and Sarah Bird then and there gave the said Mary Ann Parsons divers mortal bruises in and upon the head stomach sides and back of her the said Mary Ann Parsons of which said mortal bruises the said Mary Ann Parsons from the said first day of January in the year of our Lord 1850 until the fourth day of January in the year of our Lord 1850 to wit then and there at the parish aforesaid in the county aforesaid did languish and languishing did live on which said fourth day of January in the year last aforesaid the said Mary Ann Parsons at the parish aforesaid in the county aforesaid of the said mortal bruises died. And so the said Robert Courtice Bird and Sarah his wife the said Mary Ann Parsons in manner and form aforesaid by the means aforesaid feloniously wickedly wilfully unlawfully of their malice aforethought did kill and murder against the peace of our Lady the Queen her crown and dignity.

And also for that they the said Robert Courtice Bird and the said Sarah his wife not having the fear of God before their eyes but being moved and seduced by the instigation of the Devil on the first day of January in the year of our Lord 1850 with force and arms at the parish aforesaid in the county aforesaid in and upon the said Mary Ann Parsons in the peace of God and our Lady the Queen then and there being feloniously wilfully wickedly and unlawfully and of their malice aforethought did make an assault and that the said Robert Courtice Bird then and there with both his hands and the said Sarah the wife of the said Robert Courtice Bird then and there with both her hands the said Mary Ann Parsons to and against the ground then and there feloniously wickedly wilfully unlawfully and of their malice aforethought respectively did then and there cast and throw and that the said Robert Courtice Bird then and there with both the feet of him the said Robert Courtice Bird and the said Sarah the wife of the said Robert Courtice Bird then and there with both the feet of her the said Sarah whilst the said Mary Ann Parsons being so then and there cast and thrown to and against the ground then was then and there upon the ground the said Mary Ann Parsons in and upon the head stomach back and sides of her the said Mary Ann Parsons then and there feloniously wickedly wilfully and unlawfully and of their malice aforethought did respectively then and there strike beat and kick

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“After telling the jury that the burden of proof lay upon the prisoners—who were bound to establish the truth of their plea—I directed them that if they were satisfied that there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the Crown.

“The jury thereupon found a verdict for the Crown. But a doubt existing in my mind whether I was right in my

they the said Robert Courtice Bird and Sarah his wife then and there respectively as well by the casting and throwing of her the said Mary Ann Parsons to the ground as aforesaid as also by the striking beating and kicking the said Mary Ann Parsons in and upon the head stomach back and sides of her the said Mary Ann Parsons in manner and form aforesaid while on the ground as aforesaid then and there thereby giving to the said Mary Ann Parsons divers to wit twenty mortal bruises in and upon the head stomach back and sides of her the said Mary Ann Parsons of which said mortal bruises so caused as aforesaid the said Mary Ann Parsons from the said first day of January in the year of our Lord 1850 until the fourth day of January in the year of our Lord 1850 then and there to wit at the parish aforesaid in the county aforesaid did languish and languishing did live on which said fourth day of January in the year last aforesaid the said Mary Ann Parsons at the parish aforesaid in the county aforesaid of the said mortal bruises so given as aforesaid died. And so the said Robert Courtice Bird and Sarah his wife the said Mary Ann Parsons in manner and form aforesaid by the means aforesaid feloniously wickedly wilfully and unlawfully and of their malice aforethought did kill and murder against the peace of our Lady the Queen her crown and dignity.

And they the said Robert Courtice Bird and the said Sarah the said wife of the said Robert Courtice Bird further say that the said felony and murder so charged upon them in the said last-mentioned indictment as aforesaid included divers assaults therein supposed and alleged to have been made and committed by them the said Robert Courtice Bird and the said Sarah the said wife of the said Robert Courtice Bird against the person of the said Mary Ann Parsons in the said indictment named. And they the said Robert Courtice Bird and the said Sarah the said wife of the said Robert Courtice Bird further say that they did then and there respectively plead not guilty to the said last-mentioned indictment and that they were thereupon then and there in due form of law respectively tried upon the said last-mentioned indictment by a jury of the said county then and there in due form of law summoned impanelled and sworn to speak the truth of and concerning the premises in the said last-mentioned indictment mentioned and to try the said issues so joined between our sovereign Lady the Queen and them the said Robert Cour-

direction to the jury, I thought it fitting to state the foregoing circumstances, and the question of law arising upon them, for the opinion of the Justices of either bench, and the Barons of the Exchequer, under the Act of the 11 & 12 Vict. entitled, 'An Act for the further Amendment of the Criminal Law,' and the case before stated is the case upon which such opinion is required.

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tice Bird and the said Sarah the said wife of the said Robert Courtice Bird respectively as aforesaid and which said jury upon their oaths did then and there say that they the said Robert Courtice Bird and the said Sarah the said wife of the said Robert Courtice Bird respectively were not guilty of the premises in the said last-mentioned indictment specified and charged on them respectively as aforesaid as they the said Robert Courtice Bird and the said Sarah the said wife of the said Robert Courtice Bird by their pleas to the said last-mentioned indictment respectively alleged whereupon it was then and there considered by the said last-mentioned Court that the said Robert Courtice Bird and the said Sarah the said wife of the said Robert Courtice Bird of the premises aforesaid in the said last-mentioned indictment specified and charged on them respectively as aforesaid should be discharged and go acquitted thereof without day as by the record of the said proceedings now here appears. And they the said Robert Courtice Bird and the said Sarah the said wife of the said Robert Courtice Bird further say that they the said Robert Courtice Bird and the said Sarah the said wife of the said Robert Courtice Bird now here pleading and the said Robert Courtice Bird and the said Sarah the said wife of the said Robert Courtice Bird in the indictment aforesaid named and thereof acquitted as aforesaid are respectively the same identical persons respectively and not other or different persons respectively and that the said Mary Ann Parsons in the said last-mentioned indictment named is the same identical Mary Ann Parsons as is named in the indictment to which they the said Robert Courtice Bird and the said Sarah the said wife of the said Robert Courtice Bird are now here pleading and that the said assaults so included in the said felony and murder so charged upon them the said Robert Courtice Bird and the said Sarah the said wife of the said Robert Courtice Bird in the said indictment in this plea mentioned in this behalf and therein supposed and alleged to have been made and committed by them against the person of the said Mary Ann Parsons as aforesaid are the same identical assaults beatings illtreatings and woundings respectively as in the said indictment to which they the said Robert Courtice Bird and the said Sarah the said wife of the said Robert Courtice Bird are now here pleading are respectively supposed and alleged to have been made done given and committed respectively by them the said Robert Courtice Bird and the said Sarah the said wife of the said Robert Courtice Bird respectively and not other or different. Wherefore they pray judgment of the Court here whether our said Lady the Queen will or ought further to prosecute impeach or charge them on

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“ I did not pass judgment on the prisoners, and they still remain in prison.

(Signed)

“ RUSSELL GURNEY.”

Slade, for the prisoner R. C. Bird (*a*), submitted two propositions: 1st, That the true issue raised upon the pleadings was not presented to the jury, but a totally different issue; and if the true one had been presented, that the prisoners would have been entitled to a verdict. 2ndly, That the jury, having already had the prisoners in charge upon a felony, including these assaults, they could not now be tried a second time for the same assaults; and, therefore, they should have been acquitted upon the plea of *autrefois acquit*. The prisoners had been tried at the March Assizes for Devon, for the murder of Mary Ann Parsons, and the assaults which were charged to have occasioned her death were stated in every possible way; and the counsel for the Crown relied upon those very assaults in support of the charge. Medical evidence showed that the cause of death was a blow upon the head, which was not proved

(*a*) *Slade*, on the former hearing, stated that the plea was not so informal as, on the case, it appeared to be; that he had applied to the learned judge who tried the case to amend, but that learned judge thought it was unnecessary. He had also applied for an amendment in the statement of the assault by striking out the words “ and it was also proved that some time before the death, but the precise time was not fixed, the deceased had been flogged with a birch on the legs and thighs.” It was then agreed by counsel, with the approbation of the Court, that those words should be struck out, and the hearing of the case proceeded. This arrangement did not appear to be approved by the fourteen judges; they, however, acted upon it.

account of the premises in the said indictment to which they are now here pleading contained and specified and whether they ought further to answer thereunto respectively and that they may be dismissed this Court without delay.

REPLICATION.

That they were not acquitted of felony and murder including the same identical assaults beating illtreating and wounding as in the indictment to which the said R. C. Bird and Sarah his wife have now pleaded *modo et formâ*.

to have been given by the prisoners. It was then suggested that the parties might be convicted of an assault. *Reg. v. Crumpton (a)* was cited, and the learned judge who tried the case ruled that the parties could not be so convicted. The parties were again indicted for an assault; they pleaded *autrefois acquit*: this plea was traversed by the replication. The counsel for the prisoners were put to the proof of their plea. They put in the record of the former acquittal, and they proved the identity of the assaults, and that there were no other assaults in question, upon the trial for the minor offence, than those which had been proved at the former trial. Upon that state of facts counsel for the prisoners contended that the prisoners were entitled to be acquitted; for whether those assaults conducted to the death was no part of the issue raised. The learned judge, however, who presided at the trial of the second case, in summing up, directed the jury in the very words to be found in *Reg. v. Crumpton*. Upon this direction the prisoners had no chance, because the former jury had already found that those blows did not conduce to the death. The simple issue before the Court was, whether the assaults were the same as those proved upon the trial for the murder. A murder may include divers assaults; here divers assaults were laid as conducing to the death, and the prisoners were acquitted of the murder, including those identical assaults. Every averment in the plea was proved, and the finding of the jury should have operated as an acquittal of the prisoners. But the Court raised a separate and distinct issue—one which was not upon the record. If the issue raised upon the record had been left to the jury, they must have found for the prisoners. If the Crown had wished to raise the question put by the learned judge to the jury, it should have been

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(a) Car. & M. 597.

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put upon the record. [*Alderson*, B.—The only question for us is, Was the direction right? *Jervis*, C. J.—And that raises collaterally the construction of the statute. *Lord Campbell*, C. J.—You have only to show that the prisoners were in peril before for this offence.] That is the second proposition.

Whether the prisoners had been in peril before will depend upon the construction of the statute 7 Will. IV. & 1 Vict. c. 85, s. 11 (*a*). It is not upon every felony charged that a prisoner can be convicted of an assault under that statute. The Court would recollect a case where a man was indicted for entering a house for the purpose of committing a rape, and it was held that he could not be convicted of an assault (*b*). There is a note in *Russ. on Crimes* (*c*) which had not met with the sanction of the Judges, and *Parke*, B., had observed that if it was to be treated as law, the statute might be considered as done away with. He would call their Lordships' attention to the cases, as they had been decided, in chronological order. With the exception of *Reg. v. Crumpton*, there is no decision to support the view of the learned Judge who tried this case. The statute passed in 1837. The first case to be met with was *Reg. v. Ellis* (*d*) in 1838. There the party was indicted for a highway robbery accompanied by violence, and the jury found that the robbery was not committed by the prisoner, and that he never intended to commit any felony; but the assault being proved, it was decided, by *Park*, J., and *Alderson*, B., that the case

(*a*) Enacts, "That on the trial of any person for any of the offences thereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding," &c.

(*b*) *Qy. Reg. v. Watkins*, 2 M. C. C. 217; nor where indicted for administering poison for the purpose of procuring abortion: *Reg. v. Dihworth*, 2 M. & Rob. 531.

(*c*) Vol. I. p. 782, last ed.

(*d*) 8 C. & P. 654.

was within the meaning of the statute, and that the prisoner was properly convicted of an assault. In principle, that case is the same as the present ; it negatives the correctness of the ruling of the learned Judge in this case. In the case cited by Park, J., in *Reg. v. Ellis*, the party was indicted for a rape ; the rape could not be satisfactorily made out, but the party was convicted of an assault. It is immaterial what is the offence charged, if, for the purpose of convicting for that offence, it is necessary to prove one or more assaults ; upon such proof the jury may convict of assault only. The statute must be construed the same with reference to all felonies, including an assault, whatever their character. The next case was *Reg. v. Futteridge (a)* : in that case, Parke, B., said, " On an indictment for felony you ought not, under the statute, to convict of a completely independent and distinct assault." He was not attempting to argue that a person might be convicted of an assault unconnected with the offence charged. In *Reg. v. St. George (b)*, Parke, B., said that a prisoner could only be found guilty under this Act of Parliament of an assault involved in, and connected with, the offence charged. He contended for nothing more. In *Reg. v. Brimilow (c)*, a boy under fourteen years of age was indicted for a rape, and it was held that he might be acquitted of the felony and convicted of an assault under the statute. In *Reg. v. Pool (d)*, Gurney, B., ruled that a person indicted for manslaughter might be convicted of an assault, under the statute. If the ruling in that case can be supported, it puts an end to the present case. *Jervis, C. J.*—There the death could not be traced to a felonious act.] So here the blow may have been the result of an accident. [*Coleridge, J.*—It is stated to have been the result of a blow inflicted.] That would not appear to

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(a) 9 Car. & P. 471.

(b) 9 Car. & P. 483.

(c) 2 Moo. C. C. 122.

(d) 9 Car. & P. 728.

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be material after the other cases he was about to cite. In *Reg. v. Gould (a)*, it is said, "If a party charged with the crime of murder, committed in the perpetration of a burglary, be generally acquitted on that indictment, he cannot afterwards be convicted of the burglary with violence, as the general acquittal on the charge of murder would be an answer to that part of the indictment containing the allegation of violence." There the prisoner had been tried and acquitted on a charge of murder committed in the prosecution of a burglary; and upon being subsequently indicted for the burglary, Parke, B., in summing up, said that "if the prisoner had been indicted for burglary *with violence*, as he might have been convicted of manslaughter, *or even of assault*, on the indictment for murder, on which he had been acquitted altogether, in his opinion that acquittal would have been an answer to the allegation of *violence*, if it had been inserted in the indictment." The next case was *Reg. v. M'Phane (b)*; there the prisoner was indicted, with others, for cutting and wounding with intent, and Tindal, C. J., told the jury that if they were not satisfied that the prisoners did wound with intent to maim and disable the prosecutor, or to do him some grievous bodily harm, but still were of opinion that they struck the prosecutor in the way described by the evidence, they were at liberty to find them guilty of an assault only. The next case was *Reg. v. Phelps (c)*, a charge of murder: there the prisoner struck the deceased several times, and then went away; the deceased was afterwards killed by the violence of others; and Coltman, J., in summing up, told the jury that they might convict the prisoner of an assault. Suppose the case of a man assaulted and thrown overboard; an indictment for murder, and the man thrown overboard appears: it is clear that the prisoner might be convicted of

(a) 9 Car. & P. 364.

(b) Car. & M. 212.

(c) Car. & M. 180.

an assault (a) : and if upon a charge of murder, where the man is not murdered, a party may be found guilty of an assault, so may he be found guilty of an assault when upon a like charge he is, from any other cause, acquitted of the murder. He now came to *Reg. v. Crumpton* (b), which created all the difficulty in this case. That was the only case cited at the trial. There the doctrine is laid down, that if the assault is unconnected with the death, you cannot upon an indictment for murder convict of an assault. Patteson, J., there said, "I think that in order to convict a person of an assault, under the 11th sect. of the statute 1 Vict. c. 85, it must be an assault which is the subject-matter of the charge, and embodied in the charge, and which would itself be the felony but for some other cause. If it were otherwise, it would be easy in a case of manslaughter to convict a person of an assault which had really nothing to do with the case, by merely stating it in the indictment as a part of the cause of the death. I think that no assault is included in a charge of manslaughter which does not conduce (c) to the death of the deceased, although the death itself be not manslaughter. Here the surgeon disconnects this assault from the death, and I think therefore that the prisoner is entitled to be acquitted altogether." If this was to be considered as law, it would follow that in a case of manslaughter you never could convict of an assault, unless you could also convict of the principal offence ; or, in other words, the statute in all such cases would be useless. In *Reg. v. Folkes* (d), which was an

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(a) See *Reg. v. Hopkins*, 8 Car. & P. 591 ; *Reg. v. Hindmarsh*, 2 Leach, C. C. 569.

(b) Car. & M. 597.

(c) Pollock, C. B., at the Liverpool Assizes, (about 1846,) laid down that a blow given to a diseased person which accelerates death is as much manslaughter as if it was the immediate cause. In support, see *Reg. v. Plummer*, 8 Jur. 921.

(d) 2 Moo. & R. 460.

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indictment for carnally knowing and abusing a girl under ten years of age, the jury acquitted the prisoner of the felony, and found him guilty of an assault. It was suggested, that some of the learned judges doubted whether the prisoner could be so convicted; but Rolfe, B., who tried the case, expressed himself to be clearly of opinion, that the conviction was proper. [*Alderson*, B.—There is this difficulty; that is, a charge of carnally knowing: it may have been with consent, and therefore does not necessarily include an assault.] In *Reg. v. Archer* (a), which was a case before the fifteen judges, it was held, that although the party was acquitted of the murder he might be convicted of an assault. That case showed that it was not necessary that the assault of which the party is convicted should conduce to the death. He submitted, that all these cases which were charges of felony, including an assault, might be construed in the same way if they had been charges of murder. *Reg. v. Boden* (b) was an indictment for an assault, with intent to rob. There that which was charged as an intent to rob, was rather an act done in pursuance of a right to that which the prisoner sought to deprive the prosecutor of: but Parke, B. said, “There remains the assault;” and his Lordship stated that there was much difficulty in putting a proper construction upon this statute: but in passing sentence his Lordship said, “There appear to be two constructions of the statute, *either of which will authorize a conviction for an assault in this case.* The first is, that the statute warrants a conviction for an assault in every case, where the felony charged includes an assault. It may have been the intention of the legislature to do away with the distinction that formerly prevailed;—that on an indictment for a felony the prisoner could not be convicted of a misdemeanor included in such

(a) 2 Moo. C. C. 283.

(b) 1 Car. & K. 395.

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felony (a), although in the case of complicated felonies, as murder and burglary, he might be convicted of a lesser felony included in such charges. One ground of the former distinction was, that in felony the prisoner was not entitled to make his full defence by counsel, and therefore, if he was convicted of a misdemeanor on an indictment for felony, he would have been deprived of the benefit of his counsel's address to the jury; but, since the Prisoner's Counsel Act, this distinction is done away with; and it may therefore have been the intention of the legislature to permit a conviction for an assault in the case of any felony including an assault. The second construction is, that the statute authorizes a conviction of that assault which is offered in evidence on the part of the prosecution, in support of the felony charged. Therefore, *quacunque viâ*, the prisoner in this case may be convicted of an assault." His Lordship then referred to the note spoken of in Russ. on Crimes, and said, "Another view of the statute has been suggested in a very learned note to a recent edition of Mr. Serjeant Russell's work on the Criminal Law; but it seems to me that that view of the statute would exclude a large number of cases, such as cutting with intent to do grievous bodily harm; and there are so many instances in which it has been held that the statute applies to such cases, that I think it cannot be so limited." *Reg. v. Lewis* (b) also is a case directly in point; that was an indictment for manslaughter; there it was negatived that death was caused by the assault proved, and Coleridge, J., told the jury, that "Whenever a charge of felony includes an assault and the jury think that the felony is not made out, the party may be convicted of an assault." Substitute the words "manslaughter" for "murder" and the cases were the same. [*Coleridge, J.*—That case is too large.] *Reg. v. Birch* (c),

(a) See, however, *Rex v. Scofield*, Cald. 397. (b) 1 Car. & K. 419.

(c) 2 Car. & K. 193; S. C., 1 Den. C. C. 185; 2 Cox, C. C. 22.

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for the purpose of this argument, was precisely in point. That was an indictment for robbery; there was no evidence of any robbery and the jury found the prisoner guilty of an assault; and the Judges, after considering all the authorities, were unanimously of opinion that the prisoner was properly convicted. They thought that the statute was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony; nor was it to be extended to all cases in which the indictment for a felony, on the face of it, charged an assault. But they were of opinion, that in order to convict of an assault under this section, the assault must be included in the charge on the face of the indictment; and also be part of the very act or transaction which the Crown prosecutes as a felony by the indictment. That was a much stronger case than the present, or any other case in the books to which he could call attention; there no felony was proved; it was only surmised. It had been the ruling case ever since. In *Reg. v. King* (a) the prisoner was indicted for manslaughter: it appeared by the evidence that the assault proved had no connection with the death; that it did not accelerate the death; that the deceased died from natural causes. And Lord Denman, C. J., in giving judgment, said, "The question is, does the charge made include an assault?" It does, in this instance, include the assault proved, because it was to this, and to this alone, that the evidence was directed. It seems now to be the opinion of the Judges, that if the facts adduced *bonâ fide* to prove the felony fail in so doing, but yet establish that an assault has been committed, the case is within the statute." If you may convict the party of an assault when the death arises from natural causes, *à fortiori* may you so convict when the death is the result of violence.

(a) 2 Cox, C. C. 95.

Reg. v. Auty (a) is also in point: there the parties had been fighting, but the evidence of the surgeon established that the death was not occasioned by the blows received, but was the effect of beer and spirits which had been administered to the deceased; and Platt, B., after consulting with Williams, J., left the question of assault to the jury. The next case was *Reg. v. Connor* (b): there the prisoner was indicted for manslaughter, and it was proved that he had kicked the deceased sixteen or seventeen days before she died; but it was also proved that the cause of death was diseased lungs, and that her death had not been accelerated by violence: and Mr. Serjeant Murphy, who tried the cause, after consulting with Pollock, C. B., directed the jury to acquit the prisoner altogether, as he was of opinion they could not convict him of an assault under the statute, and that the evidence went to show that the lapse of time was sufficient to disprove any connection between the assault and the death. *Reg. v. Gisson* (c) was an indictment for rape: there Pollock, C. B., stopped the case for rape, intimating that the charge of felony could not be sustained, and that, in the absence of evidence which should have been produced, the prosecution was premature, and the prisoners ought not then to have been on their trial for the misdemeanor any more than for the felony. It was then submitted on the part of the prosecution whether the prisoners could be again tried for the assault, when his Lordship said, "I have no doubt at all they may be so tried. If there be an acquittal here, and then a plea of *autrefois acquit* to the subsequent indictment for the misdemeanor, that plea could not be supported by the production of the present record." That case was in favour of the prosecution. He then referred to

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(a) 2 Cox, C. C. 282.

(b) 2 Car. & K. 518.

(c) 2 Car. & K. 781.

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Reg. v. Barnett (a) and *Reg. v. Walker (b)*. These constituted the whole of the cases of recognized authority to be met with, bearing either way upon the question. There was also a case in the short-hand writer's reports of the proceedings at the Central Criminal Court, *Reg. v. Rook (c)*. That was an indictment for murder: the cause of death was proved to be inflammation of the lungs, and Platt, B., decided that the jury could not convict of an assault unless it was connected with the death; but he was of opinion the assault was included in the charge, and the person was convicted of an assault. These were all the authorities. It had been said, Of what assault could they have been convicted? The jury had them in charge for all the assaults. They were in peril in respect of them all. The legislature did not impose this difficulty upon the jury, for the statute is, "may be found guilty of assault," not, of *an* assault. It includes therefore several assaults. If they had been convicted of all the assaults, the Court might have passed sentence upon each of them: if they did not, it must be concluded that one sentence was intended to embrace the punishment for the whole. Here the parties stood in peril of being found guilty of assault; the assault need not to be in prosecution of the felony charged; it is sufficient that it forms part of the transaction charged as a felony. Suppose it had been stated that the death had been occasioned by one assault

(a) 2 Car. & K. 594; marginal note—"A., B. and C. were indicted for having robbed and beaten D. A. knocked D. down, and it was imputed that B. and C. stole his property from his pockets; *Held*, that if B. and C. stole the property and A. did not participate in the robbery, A. could not be convicted of an assault, as the assault committed by him was an independent assault unconnected with the robbery; but that if the jury thought that D. was not robbed by any of the prisoners, but had been assaulted by all of them, they might find all guilty of the assault." *Per* Cresswell, J.

(b) 2 Moo. & R. 446.

(c) Aug. 23, 1850, p. 502; since reported in 4 Cox, C. C. 400.

instead of divers assaults, and the medical evidence had put them out of Court, could not the prisoners have been convicted on that one assault? He therefore submitted that the prisoners were entitled to the judgment of the Court, first, on the ground of misdirection, and secondly, on the ground that the prisoners had already been in peril, and were not liable to be put in peril again.

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Cox (a) (for Sarah Bird) contended that she was entitled to this plea. He did not know whether it was intended to be said that a prisoner could not plead an acquittal to a felony on a charge of misdemeanour. Before the statute, the plea could not have been maintained; but the statute had altered this; not by making the misdemeanour a felony, but it had empowered the jury to find the party upon an indictment for felony guilty of a misdemeanour. The prisoners were entitled to this plea, as if before the statute they had been acquitted of the murder or manslaughter, and afterwards tried and acquitted for the misdemeanour. The plea of *autrefois acquit* points out to the jury that the party has been in peril before from an inquiry into the same facts, upon which inquiry he was acquitted. The test whether such a plea is a bar, as laid down in Arch. C. P. (b) is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. This however must be taken with some qualification. He then referred to *Rex v. Vandercomb* (c), *Rex v. Sheen* (d). The question was, whether the prisoners were so put in peril that by any evidence which might have been adduced, they might have been convicted upon the first trial. It was a

(a) Alderson, B., observed that the parties having pleaded the same plea, the Court could not hear two counsel on the same side; but Mr. Cox observing that certain points had been reserved for him to argue, the Court heard him.

(b) P. 88, 9th ed. "Autrefois acquit." (c) 2 Leach, 716; 2 East, P.C. 552.

(d) 2 Car. & P. 634.

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question which the jury alone could decide. If a contrary opinion could have been obtained from any other surgeon, the prisoners might have been convicted upon that indictment. It does not follow that the assaults did not conduce to the death from the fact that it could not be proved that they did. The jury find the parties not guilty of the crime charged, and the Court ought not to sit in judgment upon the verdict of the jury, and say that the finding was by reason of some defect in the evidence. It is sufficient that the parties are found "Not Guilty." In this case there is no evidence to show that the verdict was not the result of a total disbelief of the witnesses by the jury.

Another question was, whether the parties had been legally convicted of the assault upon this indictment. Suppose the jury upon the former trial to have rejected the summing up of the learned Judge and to have found the prisoner guilty of an assault, would not that have been a legal finding? It would have been a conviction which could only have been got rid of by the Queen's pardon (a). The plea of *autrefois acquit* extended to all the Acts which were or might have been given in support of the charge (b).

Rowe (c), with him *Karslake*, for the Crown, agreed that if the prisoners could have been legally convicted of these assaults upon the first trial they could not have been put upon their trial a second time: but, he contended that they could not legally have been so convicted,

(a) Pollock, C. B., upon the former hearing suggested that in such a case there might be a writ of error granted upon an application to the Attorney-General, who would confess, and so end the matter.

(b) The arguments on behalf of the prisoners upon the first hearing were the same in substance as upon the second, reported above.

(c) The Solicitor-General was not present at the hearing before the fourteen Judges; we have however thought it advisable to give his argument upon the former hearing.

Solicitor-General (Cockburn) (on Friday, 22nd November, 1850).—There was, no doubt, a considerable conflict of opinion upon the construction of this statute; it was therefore necessary to advert to first principles. He

and therefore they had not before been in peril. He did not mean to contend that parties acquitted of a felony could not plead *autrefois acquit* on a charge of misdemeanour. The first question was, what was the construction to be put upon the Act of Parliament. Upon the facts all were agreed. The statement made by the opening Counsel cannot be the test, for in some cases there is no opening by counsel. What was material, was to ascertain of what the parties had been previously acquitted. [Lord Campbell, C. J.—They were acquitted of all that they might have been convicted of, and therefore the question resolves itself into, what might they have been convicted of?] He referred to the statute; what was the meaning of the words “the crime charged?” It was said that it must mean the crime

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would begin with the law as laid down in *Rex v. Vandercomb*, 2 Leach, C. C. 720; 2 East, P. C. 522. It is there laid down as the true criterion upon a plea of *autrefois acquit* that, unless the facts charged upon the second indictment would have warranted a conviction of the party accused upon the first indictment, the acquittal upon the first indictment is no bar. That was the true principle, and was confirmed in *Rex v. Birkenough*, Ry. & M. 477; 1 Russ. on Crimes, 836. The question was whether these prisoners could have been convicted upon the evidence, of the crime charged upon the first indictment. There could not be the slightest doubt that they could not have been. He might venture to assert that as a proposition which no person could dispute. To convict either prisoner was impossible. Although there was evidence to show that the prisoners had inflicted the beatings which the surgeon disconnected with the cause of death, there was no evidence to show who committed the last and serious offence, the blow upon the head; there was no evidence to show how or by whom that blow had been inflicted. The more important question, however, was whether the parties under the circumstances could, upon the first indictment, have been convicted of an assault. That proposition was met by *Reg. v. Crompton*, Car. & M. 597; and he had to contend that the learned Judge in that case was perfectly right in principle, and was supported by other authorities. If upon the first trial the question of assault had been left to the jury it would have been but fair to the prisoners that this point should have been reserved. The attention of the Court had been called to a great variety of authorities; he would not go at great length into those cases, but would apply himself to the principle of them. The whole question turned upon the statute 7 Will. IV. & 1 Vict. c. 85, s. 11. Before the statute it frequently occurred that persons charged with a felony, and who were proved to have been guilty of serious assaults, were ac-

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charged upon the face of the indictment. He thought that was not the criterion, as much latitude was frequently taken in drawing indictments. It appeared that those who framed the statute contemplated a series of charges which in themselves *necessarily* involved an assault. A question might arise whether the judge should consider it his duty in all cases to direct the jury as to the question of assault. In *Reg. v. Birch* (a), it might be that the assault was set out upon the face of the indictment. It was, however, clear, that in a case of rape the party might be convicted of an assault, although an assault be not charged. [Lord Campbell, C. J.—A man cannot commit a rape without an assault.] In *Reg. v. Dilworth* (b), which was a case of poi-

(a) 1 Den. C. C. 185.

(b) 2 Moo. & R. 531.

quitted altogether, the consequence being a total failure of justice. The object of the statute was that where persons charged with a felony should be acquitted by reason of insufficient evidence to prove the intent, they might be convicted of the assault only. Some of the cases have gone to this extent—that where a felony has been charged and a misdemeanour proved, although the acts were altogether unconnected with the offence charged, the party might be convicted of the misdemeanour. The case of *Reg. v. Pool*, 9 C. & P. 728, which was much relied on, is not borne out by the subsequent cases, but is in fact overruled by them. In order that a conviction for an assault should take place under the statute, the assault must be connected with the felony charged. With one or two exceptions the Court would find that in every case the assaults upon which the parties were convicted under the statute were connected with the felony charged; and those one or two cases he would call upon the Court to review. With respect to *Reg. v. Ellis*, 8 C. & P. 654, cited in 1 Russ. on Crimes, 780, there it could not be said that the party committed the robbery, but he was seen to take a part in inflicting an assault, and if a robbery was committed the assault was a part and parcel of the same transaction. But it would be found that the doctrine upon which that case proceeded was not upheld. The next case was *Reg. v. Gould*, 9 C. & P. 364. The observations relied upon in that case were very much like an *obiter dictum* and were not to be taken as a direct authority in favour of the prisoners; but there it would have been the same identical acts constituting the felonies in the one case and in the other. That case is in direct opposition to the deliberate opinion of all the Judges in *Rex v. Vandercomb*, 2 Leach, C.C. 716; 2 East, P.C. 552. A person is not to be convicted of the minor offence under the statute, and so to escape being subsequently indicted and convicted for an offence of a higher

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soning, a question arose whether it was within the statute, and it was held that the prisoner could not be convicted of an assault. In *Rex v. Watkins* (a), the prisoner was indicted for burglary, with intent to commit a rape upon A., and with beating A. The prisoner was convicted of an assault, and the Judges held the conviction wrong. [*Alderson*, B.—If a party is charged with an act of omission, and it is laid as an assault, could he be convicted of striking? *Maule*, J.—Here it is necessary to say that he made an assault, because a blow involves an assault.] He apprehended it was immaterial whether the word assault was

(a) 2 Moo. C. C. 217. “The assault in this case is not included in the crime charged of burglary, with intent to commit a rape. The assault of beating and wounding is only additional.”

nature. A person is charged with murder, and the evidence to support that charge fails, but it is proved that he committed a burglary with violence: is he to be convicted of a common assault, so that he cannot subsequently be convicted of the burglary with violence? *Rex v. Archer*, 2 Moo. C. C. 283, did not appear to him to touch this case. In *Reg. v. Gutteridge*, 9 C. & P. 471, the learned Judge laid it down distinctly that unless the assault is connected with the charge the party cannot be convicted. In *Reg. v. St. George*, 9 C. & P. 483, the main charge was an attempt to fire a pistol, and the question arose whether the prisoner could be convicted of an assault committed before drawing the pistol; and there it was held that the prisoner could only be found guilty under the statute of an assault which was involved in and connected with the presentation of the pistol. The next case (*Reg. v. Phelps*, 2 Moo. C. C. 240) was a more important one, as having been decided by the fifteen Judges. It is there said the Judges were unanimous. The prisoner was indicted, with others, for murder: the prisoner struck the deceased and went away; the deceased was then assaulted by others, and it was held that Phelps could not be convicted of an assault. That case was stronger than the present, as the assaults there were one continuous transaction, whereas the blows inflicted by the prisoners in this case were inflicted months before. That case was a direct authority in his favour, and being a decision of all the Judges must be considered as overruling all the other cases stated. He then came to *Reg. v. Crumpton*, C. & M. 597, a case immediately in point. There Patteson, J., said, “It must be an assault which is the subject-matter of the charge and embodied in the charge, and which would itself be the felony but for some other cause. If it were otherwise it would be easy in a case of manslaughter to convict a person of an assault which had really nothing to do with the case, by merely stating it in the indictment as a part

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inserted in the indictment. Whether the crime charged includes an assault does not depend upon the words of the indictment, and if an assault is proved, then it becomes necessary to see whether that assault was an essential part of the evidence in support of the crime charged. The broad distinction, running through all the cases which had been brought before the Court, had not been adverted to; and much of the fallacy of the argument on behalf of the prisoners had arisen from not regarding that distinction. What was to be considered was, whether an unconnected charge could be made the subject of a finding of an assault. [Lord Campbell, C. J.—What is the definition of an unconnected charge?] He would refer to the definition of

of the cause of the death. I think that no assault is included in a charge of manslaughter which does not conduce to the death of the deceased, although the death itself be not manslaughter." One would have supposed that *Reg. v. Phelps* and *Reg. v. Crompton* might be regarded as settling the question, but he was bound to admit that subsequent cases seemed to go the other way. *Reg. v. Boden*, 1 C. & K. 395, is scarcely a case to be referred to as an authority for the prisoners, because had it been a case in which the prisoner would have undergone a lengthened imprisonment the point of law would in all probability have been reserved: it was not reserved; not, perhaps, because his Lordship was altogether satisfied that the party might be convicted of an assault under the indictment, but because his punishment would be of so short a duration as to render it unnecessary to take the opinion of the Judges. Is it to be said that a man is to be acquitted upon a subsequent charge because certain evidence necessary to be produced in support of that charge was given in support of a former charge in order to show the animus by which the party was actuated? [Pollock, C. B.—There must be some mistake in that case. It cannot be supposed that the learned Judge intended to say that the two modes pointed out exhausted every possible mode of construing the statute.] But that case is distinguishable, inasmuch as there the assault was connected with the robbery, but the robbery was not proved. *Reg. v. Lewis*, 2 C. & K. 419, must be taken with some qualification: it is not because the felony is connected with an assault that you may convict of any assault whatever. Then came *Reg. v. Birch*, 1 Den. C. C. 185, upon which his learned friend relied as being precisely in point. That case was more fully reported in 2 Car. & K. 193. The main point there taken into consideration was the intent to rob. It was considered as one and the same transaction, but the doubt was whether the party had assaulted with intent to rob, and the jury negatived the intent to rob and convicted the prisoners

Patteson, J., in *Reg. v. Crumpton (a)*; *Reg. v. O'Connor (b)*, was also an illustration of what is or is not connected with the crime charged. [*Maule, J.*—All that is there said is, that it was a case of manslaughter. It might have been a rash administration of medicine, and not have been the result of any assault at all. *Pollock, C. B.*—I am far from satisfied that the opinion there attributed to me is correctly stated.] If the Judge upon the former trial was right in law in withdrawing the question of assault from the consideration of the jury, the prisoners have not been in peril for these assaults. Without going through the whole of the cases, he would observe, that from the first to

(a) Car. & M. 597.

(b) 2 Car. & K. 518.

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of a common assault. The way the difficulty arose was this:—in Mr. Grievess's note, 2 Russ. on Crimes, 782, it is contended that the statute was intended to apply only in cases where the party being indicted for a felony consisting of the assault, the intent, and the result, and proof of the result failing the party might be found guilty of an assault including the intent; but, if the intent was not made out, the assault in no way tended to prove the felony, and the party could not therefore be convicted of an assault. In *Reg. v. Birch*, as reported in 1 Den. C. C. 185, this note came under the consideration of the Judges. That is not a recorded judgment, except so far as it says that the Judges were of opinion that the conviction was right. Here it is to be observed that it was one single transaction, failing in proof of part—the robbery for which the parties were tried—but the assault was proved as part of the transaction; but neither in that nor in any other case is it laid down otherwise than that it must be part of the same transaction. In *Reg. v. Greenwood*, 2 Car. & K. 339, it is laid down that the assault must be committed in the course of the proceeding, which, if completed, would have constituted the felony charged. This case was at variance with *Reg. v. Birch*. He then cited *Reg. v. O'Connor*, 2 Car. & K. 518, in support of the prosecution. In *Reg. v. Barnett*, 2 Car. & K. 594, Cresswell, J., said, that the jury ought not to convict of an assault where it was unconnected with the robbery. In all the cases cited, with the exception of *Reg. v. Pool*, 9 C. & P. 728, there is not one in which the party has been convicted of an assault unconnected with the principal offence charged. There were, however, a few other cases to which he would now refer. In *Reg. v. King*, 2 Cox, C. C. 95, the judgment of Lord Denman, C. J., was at variance with that of the other Judges in the cases cited. It was, however, an authority in favour of the prisoners. The statute is capable of this construction, that you may convict of an assault where by evidence the assault is established as being con-

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the last the distinction was broad and clear, that where the assault was unconnected with the crime charged—unconnected by reason of the evidence—the prisoner could not be convicted of an assault under the statute. In *Reg. v. Ellis* (a), the one assault of which the party was convicted was connected with the robbery. The same distinction exists in *Reg. v. Gutteridge* (b), *Rex v. St. George* (c), *Reg. v. McPhane* (d), *Reg. v. Phelps* (e), *Reg. v. Archer* (f), *Reg. v. Boden* (g), *Reg. v. Birch* (h). [Lord Campbell,

(a) 8 Car. & P. 654.

(b) 9 Car. & P. 471.

(c) 9 Car. & P. 483.

(d) Car. & M. 212.

(e) 2 Moo. C. C. 240.

(f) 2 Moo. C. C. 283.

(g) 1 Car. & K. 395.

(h) 1 Den. C. C. 185 ; 2 Car. & K. 193, S. C.

nected with the felony charged. [Williams, J.—In *Reg. v. Auty*, 2 Cox, C. C. 282, he had concurred with Platt, B., in this distinction, that where the prosecution is for a felony attended with violence, and the evidence for the Crown shows that there was such a transaction, and the prisoner is not convicted of the felony (although he may have committed an assault), he must be acquitted altogether, because the assault was no part of the imputed transaction ; but, if the evidence for the Crown shows that there was an assault in which the prisoner was implicated, and nothing more, then he may be convicted of the assault, for then the transaction charged in the indictment is proved and the party may be convicted of it.] There is this distinction : in that case the death appears not to have proceeded from violence ; in the present case it was the result of violence committed by somebody but not proved to be the violence of the prisoners. If the murder had been proved to have been committed by another person not indicted, could the prisoners have been found guilty of an assault which in no way conduced to the death ? Further, in that case it was a single assault. As to *Reg. v. Rook* he must confess he could not understand upon what principle that case was decided. It was necessary to lay down the proposition with some limitation. What was that limitation to be ? The statute authorizes the finding guilty of an assault ; that is, the party may be convicted of any assault where that assault is connected with the principal felony charged, and where a failure of justice would take place by the escape of the party altogether. Is this a case in which the party might have been convicted of the felony ? It is true the assault proved did not conduce to the death ; the evidence proved the assaults unconnected with the death. That was the prisoner's defence, and upon that ground they were acquitted. Upon the second trial they plead *autrefois acquit*. Either party may offer evidence. The evidence before the jury was that the surgeon proved that the death had not proceeded from the blows proved to have been

C. J.—Where there is but one act charged and one act proved there must be identity.] Yes, that was his whole case. Here several acts were proved to be unconnected. In no case, except where the act was identically the same, would the jury have a right to entertain the question of a common assault. What is “the crime charged” might depend partly on the form of the indictment, partly on the evidence, and on other incidents: to attempt to lay down any fixed rule to determine “the crime charged” would be extremely dangerous, and suffer great abuses to creep into the administration of criminal justice. It would be far better to adhere to the doctrine laid down in *Reg. v. Gutteridge* and *Rex v. St. George*.

The next question was, whether a general acquittal could be

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inflicted by the prisoners, but was the result of a blow which neither of the prisoners had inflicted. The onus was upon the prisoners; but to remove all doubt the Counsel for the prosecution called the surgeon, who proved the acts of the prisoners and the act which occasioned the death to have been unconnected. The case of *Reg. v. Sheen*, 2 C. & P. 634, does not apply. The Court would not import anything into this case. As the case stood it was clear the prisoners could not have been convicted upon the first indictment of the charge contained in the second indictment; and unless they could have been they could not say that they had been previously acquitted. Was this a case to which the plea of *autrefois acquit* applied at all? The indictment charged a variety of assaults, and the Act applies to cases where “the crime charged shall include an assault.” Was it obligatory upon the jury to convict upon the first indictment of one assault? Suppose the party might have been so convicted, and it is shown that there is another assault contained in the indictment, is it compulsory upon the jury to convict of that assault also? if not, would the conviction upon the one assault be a good answer to a second indictment for the assault upon which the jury had given no verdict? Was it imperative upon the Judge in every such case to say to the jury, “If you are not satisfied that the offence charged is made out you may find the prisoner guilty of an assault.” If that were so it would lead the jury in many cases to screen the party from the legal consequences of his acts. [Williams, J.—According to the common principle of law a man is put in jeopardy for whatever is charged in the indictment.] But he is not charged with the assault: the statute merely says it shall be lawful for the jury to convict him. Could the jury have found the parties guilty of all the assaults respectively charged in the indictment (i. e. the charge of felony failing)? It is said that

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pleaded under this statute. Suppose the Judge not to put the question of assault to the jury. [*Jervis*, C.J.—The prisoner is still in jeopardy before the question is put.] If the Judge is not bound to put the question the party is never in peril. [Lord *Campbell*, C.J.—Suppose there is a count in the indictment overlooked by the Judge, is not the party in peril nevertheless?] He referred to a note to *Reg. v. Glysson* (a), where Pollock, C.B., had directed an acquittal upon the felony, and as to the assault said, “It had better be in-

(a) 2 Car. & K. 781.

they might, because each assault is alleged in a separate count; but then the difficulty would be that the prosecutor might be called upon to elect, the acts appearing to be separate and distinct: a series of acts were here introduced because they were supposed to lead up to the crowning transaction. Suppose then the jury to have convicted of one assault, the parties would have gone scot-free as to all the rest: this the statute never could have intended. If the prisoners had been convicted of a common assault, they could not afterwards have been indicted for an assault to do grievous bodily harm. It is a strange anomaly if upon so grave a charge the jury are to be compelled to find the prisoners guilty of a common assault only. It occurred to him that it was not imperative upon the Judge under the statute to charge the jury to find a common assault, but that the Judge might do so if he thought fit. A case might happen of a man inflicting a grievous wound upon another who dies from natural causes: the man is indicted for murder; is he to escape altogether because by a mistake he was tried for murder? It is not because the effect of the acts has been brought under the consideration of the jury that the party is to be discharged as to the assaults.

With respect to the misdirection: the pleadings raised this issue, “Have the parties before been acquitted of this charge?” The question is therefore whether these assaults were included in the main charge before, which can only be determined by the question whether they were or were not connected with the death. The whole question was, assaults being proved, did those assaults conduce to the death? The Judge meant to put it that the parties had been upon their trial for murder: at that trial they were only liable to be found guilty of assaults which conduced to the death: were these assaults of that character or not? The particular phraseology may be objected to, but the question in effect is the same—the identity of the assaults. The prisoners had been tried for assaults which conduced to the death, and no others; these assaults were proved not to have conduced to the death, and therefore they were unconnected with it, and the parties could not have been in peril before. What was left to the jury was in substance correct.

quired of in another tribunal." The only remaining point was that of misdirection. He apprehended there was no misdirection, that no false issue was forced upon the jury; the issue was, aye or no? were the assaults the same? and the observations of the Judge only assisted the jury in arriving at a right conclusion. He therefore submitted that the conviction ought to be affirmed.

Slade replied.

MARTIN, B.—The prisoners were indicted at the Exeter Spring Assizes, 1850, for the murder of Mary Ann Parsons. The indictment contained six counts. The first charged murder by striking with a stick; the second, by divers beatings between the 5th November, 1849, and the 1st January, 1850; the third, by beating on the 5th November and the 1st December, 1849, and the 1st January, 1850, and on divers other days between the 5th November and the 1st January; the fourth, by blows inflicted with a scourge; and the fifth and sixth by casting her on the ground.

At the trial upon that indictment, the Counsel for the prosecution opened all the above assaults as *conducting* to the death, but stated that if he should fail in proving that they conducted to the death, they would furnish evidence of the *animus* of the prisoners.

It was proved at the trial that the death (which took place on the 4th January, 1850) was caused exclusively by one particular blow on the head, and there being no evidence that this blow had been struck by either of the prisoners, they were acquitted.

At the last Exeter Summer Assizes, the prisoners were indicted for the misdemeanour of having assaulted Mary Ann Parsons. The prisoners pleaded *autrefois acquit*, which was traversed, and issue joined thereon. The record of the former trial was put in evidence, and it was proved

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that evidence had been given thereat of different assaults committed by the prisoners upon the deceased throughout the months of November and December, 1849 ; one on the 5th November with a stick, another at the end of November or beginning of December also with a stick, and another with a furze bush about the 11th December ; and it was not proved at the second trial that there were any other assaults committed but those which were given in evidence at the first trial.

The learned Judge directed the jury that if there were several distinct and independent assaults, some or one of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the Crown. Upon this direction the jury found a verdict for the Crown. And the learned Judge stated a case containing the foregoing statement for the opinion of this Court.

The substantial question now to be decided is, whether upon the trial for the murder, the prisoners could lawfully have been convicted of these assaults under the 11th sect. of the statute 7 Will. IV. & 1 Vict. c. 85, for it was conceded by the Counsel for the Crown that if they could have been so lawfully convicted, they cannot be tried a second time for the same assaults, the principle of law being, that a person cannot be more than once put in a peril of the same character for the same act or acts.

I am of opinion that they could have been so lawfully convicted. The section enacts "that on the trial of any person for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." I think the true rule for the construction of a statute is that laid down by Burton, J., in *Warburton v. Loveland* (a), and stated by Parke, B. (b),

(a) 1 Hudson & Brooks, Irish Rep. 648.

(b) 2 M. & W. 193.

viz.:—That courts ought to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, and no further.

Now to apply this rule to the present case. The first trial of the prisoners was for a felony. The crime charged, viz., murder by violence, included, in all the several counts of the indictment, assaults against the person. The evidence of the assaults was lawfully given and received in proof of the alleged murderous death. The jury acquitted of the felony, and the evidence, in point of fact, clearly warranted the finding the prisoners guilty of assault, and so also in law, inasmuch as there was no lawful excuse or justification of them. The case, therefore, seems to me to fall within the very words of the statute.

Then, is this construction at variance with or repugnant to the intention of the legislature, to be collected from the statute, or does it lead to any manifest absurdity? It seems to me that it is in conformity with the intention of the legislature, so far as I can collect it; and I am not aware that any one has contended that it is absurd.

The statute was to amend the laws relating to offences against the person. At common law a misdemeanour could not be joined in the same indictment with a felony, and the consequence was that in all cases of alleged felonious offences against the person, if the prisoner was acquitted of the felony he was free altogether upon that indictment, and a fresh indictment was necessary in order to bring the offender to justice. The object of the enactment was to prevent this necessity, and make provision for the conviction and punishment of the offender on the then present trial. And it seems to me that the object and spirit of the

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enactment is to enable the guilty person, although he be acquitted of the felony to be at once convicted and punished for the assault, if he be charged with it in the indictment. If the construction contended for by the Counsel for the Crown be the correct one, that the assault must conduce to the death, the consequence seems to me inevitable that in all cases of alleged murder or manslaughter there cannot be a conviction for an assault at all under the statute, for if the assault conduces to the death, the party whose assault is so conducive must either be guilty of murder or manslaughter, or his assault must be a lawful and justifiable act.

It would be absurd to contend that a lawful and justifiable act would be an assault within the meaning of the section, and therefore it seems to me the argument for the Crown must go the length of contending that the statute does not apply to cases of murder or manslaughter at all. I do not think it necessary to go into cases of other felonies, although I believe the same consequence will legitimately follow from the same line of reasoning, and the statute would (if it be correct) be wholly inoperative.

But I do not think this is the correct construction of the statute, and in my opinion the true criterion is, 1st, Is the assault, in point of fact, charged upon the face of the indictment; and, 2ndly, Is it part of the act or transaction which the prosecutor gives evidence of, as conducing to the felony. If it falls within these two categories, in my opinion, the prisoners may be lawfully convicted of it by virtue of the statute. The third count of this indictment charges beatings on the 5th November, and 1st December, 1849, and the 1st January, 1850, and on divers other days between the 5th November and the 1st January. Suppose there had been no evidence in respect of the particular blow which is said to have caused the death, and the jury had not been satisfied that the beatings (which it

seems to me are specifically stated in the count) had caused the death, but that the case had been left to them by the Judge, as a fair case for the exercise of their judgment. If these beatings conduced to the death, the prisoners were guilty either of murder or of manslaughter. But if they did not conduce to the death, according to the argument for the Crown, the jury ought to have been told that they could not find the prisoners guilty of the assault. It seems to me that the statute was intended to meet this very case, and if so, I think the evidence in respect of the particular blow that caused the death cannot alter it.

Again, suppose the evidence in respect of the particular blow had been given by a witness called on behalf of the prisoners, it would have been a question of fact for the jury whether the violence by the beatings, or by that blow, caused the death. This seems to me to be directly within the statute, and it cannot, in my judgment, make any difference whether the evidence was given at the trial by a witness called on behalf of the Crown or of the prisoners.

On the argument, a great number of cases were cited ; but there are only three to which I think it necessary to refer, viz., *R. v. Phelps* (a), *R. v. Crumpton* (b), which were principally relied on by the Counsel for the Crown, and *R. v. Birch* (c), which was principally relied on by the Counsel for the prisoners. *R. v. Phelps* was tried at the Summer Assizes, 1841, and the report states that the first count of the indictment charged the prisoners as principals in the first degree for the murder of John Overbury, by striking and beating him. The second and third counts charged Phelps as principal, and two others as principals in the second degree, in the following form—"That the said South and Smith," (the two other persons in the indictment with Phelps,) "at the time the felony and murder was

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(a) C. & M. 180.

(b) *Ibid.* p. 597.

(c) 1 Den. C. C. 185 ; S. C., 2 C. & K. 193.

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committed, were feloniously present, abetting, aiding, and assisting the said John Phelps." The statement of the evidence is that as the deceased was going away from a public house, Phelps struck him several times, and he was afterwards killed by violence; and the evidence went to show that the prisoner Phelps had gone away before the violence which caused the death was inflicted. The charge of murder therefore failed, and the prisoner Phelps was found guilty of an assault. The Counsel for the prisoners objected that Phelps could not be convicted of the assault, as the assault was totally independent of the felony. It was urged by them, that it was only when the assault is included in the felony charged, that a conviction for an assault can take place:—that the case was the same as if Phelps had struck the deceased, and afterwards some person wholly unconnected with Phelps, and not knowing that he had struck the deceased, had killed him after Phelps had gone away. Mr. Justice Coltman reserved the point, and the Judges were of opinion that the conviction for the assault was wrong.

I think that case distinguishable from the present. According to the report, the indictment did not charge the prisoner with beating the deceased; specifying with particularity and decision certain beatings alleged to have been given, and drawing a conclusion that thereby the death was caused; but rather seems to have charged as the beatings, those only by which the death was effected. Now if this be the true construction of the indictment, the decision is exactly conformable to my view of the right construction of the statute; for the beatings charged in the indictment would be the beatings which caused the death; beatings with which Phelps had nothing to do, and therefore the beatings which Phelps inflicted were not charged in the indictment at all; and if so, in my opinion, he could not be lawfully convicted of them.

But, in the present case, the beatings which are charged in the indictment for the misdemeanour are the same identical beatings which were charged in the indictment for the felony stated, and ear-marked, as it were, with certainty and precision. In the latter indictment, it is true, a false conclusion in fact is alleged; namely, that they caused the death, which they did not. But they were charged in the indictment as the cause of death; and, as I have already said, in my opinion, it was competent for the jury to find the prisoners guilty of these beatings, and to acquit them of the felony.

If, however, the indictment did charge the specific assaults committed by Phelps, I can only say, that the judgment seems to me to be at variance with the subsequent case of *R. v. Birch*, which I consider a better authority and in point with the present case. *R. v. Crumpton* was tried at the Spring Assizes, 1842, and the first count of the indictment charged, that the deceased was the apprentice of the prisoner; that it was the duty of the prisoner to suffer and permit him to take such proper exercise as was necessary for his bodily health, and to find and supply him with proper and necessary nourishment, medicine, medical care, and attendance; and that, the deceased being weak in body, the prisoner struck and beat him, and forced him to work for an unreasonable time, and would not allow him to take proper exercise and recreation, and neglected to supply him with proper nourishment and medicine, medical care, and attendance; by means whereof he died. The second count charged that, the deceased being such apprentice, the prisoner feloniously did make an assault on the deceased, and being weak in body, the prisoner forced him to work for unreasonable and improper times, and beat him; by means whereof he died. The evidence was, that the prisoner was a tailor, and the deceased was his apprentice; that the latter had been in ill-health for a year be-

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fore his death, and had a bad cough, and was kept at work on some occasions, from six o'clock in the morning until eight or nine in the evening; and that, about five weeks before his death, the prisoner beat him with a small cane; that about three weeks before his death, he left the prisoner's house and went to his grandfather's, where he died: and the surgeon, who made a *post mortem* examination, stated, that he died of consumption; that over-work and ill-usage might have accelerated his death: but he was not able to say that it had done so. He stated, also, that there were some bruises on his legs; but that they could not at all have contributed to death. It was urged, that the prisoner might be convicted of the assault. Mr. Justice Patteson is reported to have said, "I think, that in order to convict a person of an assault under the statute, it must be an assault which is the subject-matter of the charge, and embodied in the charge, and which would itself be the felony, but for some other cause." Now this, in my judgment, is the true construction of the statute; and it is because the assaults in the present case were the subject-matter of the charge, and embodied in the charge, and if the death had arisen from them they would have been the felony, that I am of opinion that the case is within the statute. But the learned Judge goes on to say, "I think no assault is included in a charge of manslaughter which does not conduce to the death of the deceased, although the death itself be not manslaughter:" and, as the surgeon disconnected the assault from the death, he directed an acquittal altogether.

Upon the best consideration I have been able to give to the question, I cannot concur in this latter part of his Lordship's judgment. The conducing to the death does not, in my opinion, form the test.

In *R. v. Birch*, which was tried at the Spring Assizes, 1846, the indictment charged the prisoner with an assault,

and a robbery of a watch and money. The person supposed to have been robbed did not appear at the trial; but witnesses, who saw the transaction, proved that the prisoner struck the person named in the indictment. The jury stated, they were not satisfied that there was any intent to rob, and they found the prisoner guilty of an assault. Mr. *Armstrong*, who tried the prisoner, (after consultation with Mr. Justice *Patteson*,) reserved the case for the opinion of the Judges. They were unanimously of opinion that the conviction was right; and, in delivering their judgment, they gave an exposition of the statute. It is thus stated, in 1 Den. C. C. 186:—"The enactment is not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony; nor is it to be extended to all cases in which the indictment for a felony, on the face of it, charges an assault. In order to convict of an assault under the section the assault must be included in the charge on the face of the indictment; and, also, be part of the very act or transaction, which the Crown prosecutes as a felony, by the indictment." It is thus stated, in 2 C. & K. 194:—"The opinion of the Judges was, that the statute applies whenever the indictment charges an assault, and the jury, negating the felony, find 'Guilty of the assault;' provided always, that the finding be in respect of the very same acts which the Crown seeks to make felonies; identity being the question, and not the intention of the prisoner to commit felony; otherwise, the statute would not apply to the ordinary cases of wounding, with intent," &c. In my opinion, this is the correct exposition of the statute. But, even supposing I did not concur with this judgment, it seems to me it would, nevertheless, be my duty to submit to it. It is the unanimous judgment of the Judges, given judicially upon the construction of a statute; and if such a judgment is not to be held conclusive, I am at a

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loss to know how certainty in the law can be attained. I do not mean to say, that if the very improbable case occurred—of an unanimous judgment being clearly, and obviously, and manifestly wrong—I would consider myself absolutely estopped from exercising my own reason and judgment in respect of the point decided ; but what I mean is, that if there be an unanimous judgment upon a point of difficulty and nicety, upon which a difference of opinion might reasonably have existed, and did exist before such judgment ; I think, after such judgment, I ought to be bound by it, and act upon it, and consider the matter settled and at rest.

In my opinion, this judgment directly applies to the present case, and ought to be conclusive upon it.

As I am therefore of opinion, upon the substantive question, that the prisoners were by law entitled to have had the verdict found for them upon the issue on the plea of *autrefois acquit*, I do not think it necessary to give any opinion upon the other two questions raised by the Counsel for the prisoners.

TALFOURD, J.—I am of opinion that this conviction is right ; that the plea of previous acquittal was not, and could not be sustained ; and that the charge of the learned Judge, who tried the issue joined on that plea, presented to the jury the only question which, if decided in favour of the prisoners, could have entitled them to judgment.

On behalf of the prisoners, two points were argued at the bar : *first*, that the prisoners might have been legally convicted of the assault which formed the subject of the indictment for misdemeanour on the previous indictment for murder ; and *second*, that the learned Judge, at the trial of the issue on the special plea, misdirected the jury.

The first and main question turns on the construction of

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the statute, which, for the first time, enabled juries to convict of a common assault upon an indictment for felony. That statute, passed "To amend the Laws relating to Offences against the Person," and repealing antecedent Acts, it proceeds to define the punishment of several offences of the description which its title indicates; and it is not immaterial to the true construction of the clause which refers to these offences to bear in mind their character. These are, attempts to murder by various means stated, producing wounds or bodily injury, which are made punishable with death; the attempt to administer poison, the act of shooting, the attempt to discharge loaded arms, the attempt to drown, suffocate, or strangle, with intent to murder, though no bodily injury be produced, which are made felony and punishable with transportation; similar acts committed with intents short of murder, made punishable also with transportation, and other felonies which do not necessarily involve violence. All these crimes are in their nature single definite acts—not results from several acts—each act itself being a substantive felony.

The eleventh section enacts, "That *on the trial* of any person for any of the offences hereinbefore mentioned, or for *any* felony whatsoever, where the crime charged shall include *an assault* against the person, it *shall be lawful* for the jury to acquit of the felony, and to find a verdict of *assault* against the person indicted, *if the evidence shall warrant such finding.*" The consequence of such a verdict of guilty of assault may be imprisonment for three years with hard labour, and solitary confinement for a month at a time, not exceeding three months in any one year, at the discretion of the Court. Two questions arise on this clause: What is the meaning of "the crime charged"? and what is the case in which "the evidence shall warrant the finding of guilty of assault against the person"? By the crime charged, I understand the act of felony of which the

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prisoner is accused, and for which he is tried, which, by the practice of the law, well settled long before the statute, can only be a single felony in the case of murder; must be, of physical necessity, single, when applied to one person. The "crime charged," has, in my judgment, no reference to the various statements which, at his will, in various counts, the prosecutor places on the record, but to the *corpus delicti*, for which alone, though variously stated, the prisoner can be required to answer. Considered with relation to the context, the meaning of this phrase is obvious:—that whereas some of the offences before mentioned in the Act *do* include an assault against the person—as rape or stabbing; and others *do not* include it—as the attempt to procure abortion, or the administration of poison: the statute applies its provisions to the former class of crimes and other felonies the like in character. To support the construction that the "crime charged," means the crime as varied, and presented on the face of the indictment as many crimes, the words should have been crime *as* charged. It is further to be observed, that it is not necessary to state in the indictment that the party accused "made an assault," where the offence necessarily implies violence, as has been decided in the case of rape (*a*), and will be found illustrated by the greater number of precedents of indictments for murder by violence, in the second volume of Chitty's Criminal Law. The crime of murder is comprehended in the terms "any felony whatsoever;" and, therefore, if there is any case of murder to which the statute can be practically applied, it may be so applied. But, considering that the statute enumerates many felonies of inferior atrocity to murder, of which the attempt to commit murder is the highest—all single acts to which the application of the statute is easy,—I do not believe

(a) *Allen's case*, 2 Moody, C. C. R. 179.

it was in the contemplation of the Legislature to include under the word "felony" cases of death which are not cases of mere act, but of act followed by a consequence. Without, therefore, meaning to affirm that the case of murder cannot be brought within the statute, by reason of the insufficiency of its language, I think no argument will be supplied against a construction which excludes the case in judgment, if it should follow that few cases, or even no case of felony involving death, would be practically within its operation.

The next question arising on the meaning of the words "where the evidence shall warrant such finding," is, when does the evidence warrant a finding of assault on an indictment for felony? The answer I offer is—when the very assault which the crime includes, and which either by reason of the noncompletion of a proposed felony or the absence of intent imparting to the assault a felonious character, though proved by the evidence, is also, by the evidence, shown not to amount to felony. The words "*an assault*" in the first member of the clause, and the word "*assault*," in the last member of it, are correlative terms. They do not reasonably import that if the crime includes one assault the party accused may be found guilty of another assault; but they must be read as if the word "said," or "such," preceded the latter word assault, in which case the meaning would be clear. If this construction, which seems to me to be the true literal interpretation of the passage, is erroneous, I see no other sensible construction than that which has been repudiated in argument, that, wherever a crime includes an assault, and the evidence proves an assault, however unconnected with the felony charged, and for whatever purpose offered in proof, the statute applies. If once it be conceded that it does not so necessarily apply, I see no middle course that is not founded in arbitrary conjecture, and dependent on circumstances, rendering its application uncertain. The

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intermediate course of construction proposed, I take to be, that wherever, in an indictment for murder, assaults are charged in any of its counts as the means of committing the felony, and those assaults are adduced in proof by the prosecution as conducing to the death, and are proved by the evidence to have been committed,—although by the evidence entirely disconnected from the *corpus delicti* charged,—the party accused may be convicted of such assaults: and this, although the indictment contains a count correctly stating the means of the death which is not brought home to the prisoner. If this be so, consequences never contemplated may follow from the allowance of several counts in an indictment for murder. In the case of murder, as in case of other felonies, each count on the face of it charges a separate felony; and yet it is obvious that, unless a different person be supposed to be murdered, only one felony of death can be proved; and it is certain that if the Court are apprized, before plea, that two distinct murders are meant to be alleged, they would quash the indictment; or, if after plea, they would compel the prosecutor at once to make his election on which charge he would proceed. But if, by the introduction of six counts into the indictment, stating the cause of the same death in six different ways, the prosecutor might obtain a verdict of guilty of assault on any count which charges it, though the assault is proved in fact to have no connection with the death, he would obtain the benefit of substantially charging as many felonies as counts—not to obtain a conviction of the principal charge, but of an assault altered in its usual consequences, by arbitrary position on the record. Nay, if there should happen to be as many defendants as counts, and each count should charge (as it must) a different mode of death, and by different assaults, although the death should be proved to result from one act only, and that not committed by a single prisoner or by a stranger, but each prisoner had committed such assaults as

there alleged, each might be convicted of his own separate assault, and this, although the prosecutor would not be permitted to prove more than a single felony as involving them. A single charge of murder may thus justify a conviction of numerous assaults, on counts which may be introduced or used for the purpose of affixing to a single offence, or to such offences, aggravated penalties.

But, again, the statute, when describing the offences to which it applies, uses the word singular, an "assault." In stating the matter of which the accused may be convicted, it uses the word "assault." Is it assumed that the party accused can be convicted of more than one assault? If he cannot, there is an end of this plea of previous acquittal, because the second indictment in this case charges two assaults; and surely, if the prisoners could only by law have been convicted of one on the former trial, they were only in peril in respect of one, and the plea is no answer, unless *one* can be found to be identical with *two*. If it is contended that they may be so convicted, what is the consequence? A count in an indictment may charge divers assaults, at least, between the first and last days of a year. These assaults may be charged in general terms, under which proof of aggravated assaults, or of assaults not amounting to batteries, may be offered, and a party proved to have committed one of the slightest possible assaults may be convicted and subjected to infamous punishment, which else could not have been inflicted.

If the circumstance that the indictment comprises a count which charges assaults to which proof corresponds does not bring the case within the statute, surely the opening speech of the prosecutor's Counsel, founded on instructions given by an individual client, though using the name of the Crown—perhaps made from imperfect materials—cannot change the legal character of an act elicited in proof, so as to affect the prisoner's liability to punish-

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ment. The evidence does not the more or less "warrant the finding," because of the preface made to it, or the purpose for which it is used. The question is not whether the proof of assault was relevant to the issue, as it might be to prove malice; or whether it was offered in the expectation that it would be shown to be connected with, by conducing to, the death; but whether, on the whole case developed in evidence, it was *in very deed* parcel of the act which is presented as felony. This I take to be the doctrine acted upon by Mr. Justice Patteson in the case of *The Queen v. Crumpton*; acted upon in this case at the first trial, and adopted by the learned Judge, Mr. Russell Gurney, on the second trial.

Of the authorities cited in argument, the most important are *The Queen v. Phelps*, decided in 1841 (a), relied on for the prosecution, and *The Queen v. Birch*, decided in 1846, relied on for the prisoners, because these are the unanimous decisions of all the Judges.

In *The Queen v. Phelps*, the prisoner was indicted for the murder of John Overbury, who was slain in a scuffle. Phelps, with others, had assaulted the deceased on the evening of his death, but quitted the affray, which was afterwards renewed, and in which mortal blows were inflicted by persons unknown. There was no distinct evidence to show what led to the second assault on Overbury, or to connect it with the prior assault by Phelps. The jury acquitted Phelps of the murder, but found him guilty of an assault, and the point whether he could be so legally convicted was reserved. The Judges were unanimously of opinion, that the conviction was wrong; as "The assault must be such as forms one constituent part of the greater charge of felony, not a distinct and separate assault, as this was." It seems so difficult to

(a) 2 Moody, C. C. R. 241.

distinguish that case from the case in judgment, that if this conviction be held wrong, it must, in my opinion, be by overruling that decision. Although in the case of Phelps the indictment is not set forth, it, no doubt, charged assaults by Phelps on the deceased by blows, like the second count in this indictment. In that case there can be no doubt that proof of such blows was offered and received in evidence, to prove the felony. In that case, as in this, the evidence must have been given not to prove the *animus* merely, but the act of felony; in that case, as in this, the assault so charged was proved; in that case, as in this, the jury might have found that the deceased died of the blows given by Phelps, though others afterwards struck him; and in that case, as in this, the assault was disconnected from the death, which arose, in both cases, from the act of persons unknown. In the present case, as soon as the medical evidence referred the death to a blow inflicted by some person unknown, shortly before the 4th January, 1850, assaults committed in the preceding November were at least as much disconnected from the death as assaults committed by Phelps on the same day upon which the death occurred.

The Queen v. Birch is an authority entitled to the greatest respect, as being, like the case of Phelps, the unanimous decision of the Judges, and containing a development of the rule which, in the opinion of those Judges, should govern this class of cases: but I think that, rightly considered, neither the decision as applied to the facts of that case, nor its enunciation of principle, militates against the present conviction.

The indictment charged a robbery with violence: the prisoner was seen, with others, on the night in question, to strike the prosecutor several blows; but the proof of robbery failed. The jury found the prisoner guilty of assault under the statute, and the Judges held the conviction right. Here the very transaction indicted, and which in-

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cluded an assault, was proved, only it was found not to amount to felony, one of the cases clearly contemplated by the statute. How does this show that a party can be convicted of an assault not associated with the transaction—that transaction being, in verity, the death charged, but produced by other means?

The Judges on this occasion considered the learned note in Mr. Greaves's edition of Russell on Crimes, in which he seeks to confine the operation of the statute to cases of inchoate felony, which (with the highest respect for the learning of that excellent writer) is wholly untenable, as it would exclude the cases to which the statute was primarily intended to apply,—where the act is complete, but the felonious intention wanting. They then lay down the rule, "That this enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony, on the face of it charged an assault; but in order to convict of an assault under this section, the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the Crown prosecutes as a felony by the indictment."

This rule disposes of the construction, that the charging an assault in the indictment is sufficient to warrant the finding of guilty of assault where an assault is proved; and, taking the first clause in connection with the last, it seems to refer the words, "The very act and transaction," not to the *matter charged*, but the act itself, which is the sole subject of prosecution, and which depends not on the opening or motion of counsel, but on the entire proof in the case when developed before the jury.

If this view of the case in judgment, as applied to the statute, is correct, the summing up of the learned Judge presented the only question which could be raised properly

to the jury. It is to be remembered, that a plea of previous acquittal of felony pleaded to an indictment for an assault, is not like an ordinary plea of *autrefois acquit* of murder to another indictment for murder, and where the prosecutor has nothing to prove but the identity of the prisoner, and of the party whose death is charged as murder, to establish his plea. But it being conceded that there are cases in which an indictment for felony includes an assault, and on the trial of which an assault is proved, and yet on which the prisoner cannot lawfully be convicted of an assault, and therefore is not in jeopardy of such conviction, it must on every such plea be matter of proof whether the prisoner could *have been convicted* of assault before, and that depends upon the question raised by the rule in *Birch's* case, whether the assault charged in the second indictment is part of the very act or transaction prosecuted on the first. In this the assaults secondly charged on the prisoners were not, unless they were part of the felony [death] which was the subject of the former charge; and in putting the question whether they conduced in any way to that death, the learned Judge put the question in the manner most favourable to the prisoners.

It is true, that when the evidence of the surgeon given on the first trial was read, and was repeated on the second, "the prisoners had no chance of success;" but this was because the facts afforded no ground out of which such chance could justly arise.

On the whole, therefore, I think that the construction contended for by the prisoner's Counsel not being accordant with the object of the statute, nor justified by the language of the statute, nor founded on any intelligible principle, ought not to prevail. It would lead to the consequence of enabling a prosecutor, or his Counsel, to deepen the responsibility of an offender, whose offence might be the most trivial, by the form of the indictment and the course of evi-

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indictment of the assaults charged against them by the present indictment. And as it is plain, that they could not have been legally acquitted of the assaults unless they were in peril of being legally convicted of them, the question resolves itself into the inquiry, whether on the former trial the prisoners could have been legally convicted of all the assaults charged by the present indictment, and I am of opinion that they could not.

It cannot be doubted that this question depends altogether on the operation of the statute 7 Will. IV. & 1 Vict. c. 85, s. 11. Before that statute, although the general rule was that it was not necessary to prove the crime charged by an indictment to the whole extent laid, it being sufficient for the prosecutor to prove so much of the charge as constituted an offence punishable by law; yet this rule was, undoubtedly, subject to the qualification, that if a prisoner were indicted for a felony, he could not be convicted of a misdemeanour on that indictment. But by the statute in question, it is enacted, that "On the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." The language here employed appears to me to show, that the statute did not intend that the person charged with a felony, including an assault, should be regarded, in any event, as charged with the offence of assault in addition to the crime of felony imputed by the indictment; but meant, only, that the portion of the crime of the imputed felony, which consists of the offence of assault shall, *per se*, be a subject of conviction and punishment, if it be proved that the prisoner is guilty of that portion, and of that portion only.

If therefore it shall be proved, that some person has

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been guilty of the whole of the imputed felony, including therein necessarily the imputed assault, but the evidence fails to implicate the prisoner in any portion of that guilt, he must, in my judgment, be wholly acquitted. The felony charged by the former indictment, in the present case, was homicide by violence to the person of Mary Ann Parsons. The crime charged, therefore, included an assault. It was proved that her death had been caused exclusively by a blow on the head, inflicted shortly before her death; but there was no evidence to show that that blow had been struck by either of the prisoners. It was therefore proved, that the assault, and every other portion of the suspected homicide, had been committed by some person unknown; but the prisoners were not implicated in any part of the guilt. It seems therefore to me, that they could not be convicted of any part of it, but were entitled to a general acquittal.

But it is said, that this view of the case is at variance with the decision of all the Judges in *The Queen v. Birch*. In that case, the prisoner was indicted for feloniously assaulting one Charles Darley, putting him in bodily fear, and feloniously and violently stealing from his person a watch and other property. The prosecutor did not appear, and the proof as to the felony failed. But it was proved, that on the night in question, the prisoner struck the prosecutor several times about the head, while he was lying on the ground. The jury found the prisoner guilty of an assault only, not being satisfied that it was with the intent to rob. And it was held by eleven Judges, on a case reserved, that the conviction for the assault was right, under the 7 Will. IV. & 1 Vict. c. 85, s. 11. But it must be observed, that in this case, it was not proved that any one had been guilty of the imputed robbery. The Crown failed altogether, to prove either an assault with intent to rob, or stealing from the person of the prosecutor, and established only one portion

of the crime of robbery, viz.;—that which consisted of the assault, *simpliciter*, and of that portion the prisoner was guilty. It does not follow from this decision, that if it had been proved that some one unknown, had been guilty of the felony charged, and the assault included therein (but that the prisoner was not at all implicated in any part of this guilt) the Judges would have held a conviction for assault to be warranted by the statute. In truth, they could hardly have so held, without overruling the decision of *The Queen v. Phelps (a)*; which they do not at all appear to have intended to do. In that case, the prisoner was indicted with others, for the murder of John Overbury. It was proved at the trial, that in a scuffle the prisoner struck Overbury once or twice, and knocked him down. The prisoner afterwards went home, and took no further part in the affray; and shortly afterwards, Overbury was again assaulted, and killed by some other persons, who could not be identified, and there was no distinct evidence to connect the second assault with the prior assault by the prisoner. The jury acquitted him of the felony, but found him guilty of an assault. The Judges, however, in a case reserved, thought that the conviction was wrong.

But it has been argued that this view of the case is, at all events, at variance with the definition given by the Judges, in *The Queen v. Birch*, of the requisites of an assault for which a conviction may take place under the statute, inasmuch as the Judges, in effect, resolved in that case, that it is only requisite that the assault shall be included in the charge on the face of the indictment; and, also, “be a part of the very act or transaction, which the Crown prosecutes as a felony by the indictment.” And, it is said, that in the present case, the act or transaction which the Crown prosecuted as a felony on the former in-

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(a) 2 Moo. C. C. 240.

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dictment must, on the facts stated in the case reserved, be regarded as having consisted of the homicide of Mary Ann Parsons, by means of the very assaults which are charged by the latter indictment.

But why must the Crown be thus regarded as having "prosecuted" these assaults? The Counsel for the Crown, it is true, stated them in his opening address, as conducing to the death; adding, that if he should fail in proving that they conduced to the death, they would furnish evidence of the *animus* of the prisoners. And the evidence afterwards given on behalf of the Crown, undoubtedly, included evidence of these assaults. But these circumstances fail altogether, in my judgment, to establish that the assaults in question were "part of the very act or transaction, which the Crown prosecuted as a felony." That act or transaction was, I conceive, the homicide of Mary Ann Parsons; including, necessarily, the violence which caused her death, whatever it might be. And, in my opinion, as soon as it appeared by the evidence, that a homicide had taken place, the assault which caused the death, and no other assault, became, necessarily, from the mere nature of the prosecution, identified as the assault which the Crown was prosecuting as part of, and included in, that felony. If there had been any evidence that the prisoners were guilty of that assault, surely the case must have been left for the consideration of the jury exclusively of the other assaults; for if the jury were directed, first, to consider whether the prisoners were guilty of the assault which caused the death, and, consequently, of the felony; and, secondly, in case they, the jury, acquitted of the felony, to consider whether the prisoners had been guilty of the assaults which did not conduce to the death; this would, in effect, be treating the prosecution, as if it were an indictment for assault; and, also, for a felony including an assault; which, both by *Phelps's* case, and the resolution in

Birch's case, is demonstrated to be wrong. The same difficulty would occur, if there had been evidence to implicate one only of the prisoners in the mortal assault. Could the jury, in such a case, have been properly directed to have considered the Crown as prosecuting the mortal assault, as against one of the prisoners, and the assaults which did not conduce to the death as against the other prisoner? In the present instance, it is true, the case was stopped, and no case at all left to the jury. But this makes no difference, in my opinion; for whether a jury acquit in accordance with the view taken by the Judge, because there is no evidence against the prisoner, or because the evidence is not satisfactory, in either case, they, in truth, acquit for want of sufficient evidence to convict.

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It is manifestly fallacious to make the opening of Counsel the test on the question of what is "the act or transaction which the Crown prosecutes." It is plain that the Court is not at all bound by the statements made by the Counsel in his address. Suppose, in the present case, the Counsel had stated that the last blow was the mortal one, and he should only give the preceding blows in evidence as proof of the *animus* of the prisoners; and it had turned out on the evidence, that one of the preceding blows was the mortal one, and the last one had not at all conduced to the death; could the prisoners have claimed an acquittal of the felony, notwithstanding it had been proved that they had inflicted the mortal blow?

Again—suppose the Counsel in his opening had omitted in his statement, that the assaults now in question conduced to the death, and had merely mentioned them, as proof of the *animus* of the prisoners; then, by the application of this test (though the evidence would have been exactly the same) these assaults could not have formed a part of "the act and transaction which the Crown prose-

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cuted," and the prisoner could not have been convicted of them. The test can hardly be a sound one, which thus makes the liability of a prisoner to more severe punishment, depend on the inadvertence or discretion of Counsel, or the accident—whether the evidence for the Crown is, or is not, prefaced by an address from an advocate.

The material point of time is, I think, at the close of the evidence, when the Judge has to perform the duty of telling the jury as to what part of the indictment there is a case for their consideration. At that point of time at the trial of the former indictment in the present case, it had been proved by the evidence for the Crown, that the homicide imputed by the indictment, including an assault, had been committed. In my opinion, this demonstrated, *per se*, that the act or transaction, which the Crown was prosecuting, was the homicide which thus appeared to have been committed. Consequently, I think, the prisoners could not have been legally convicted under the statute, of any assault which was not included in that transaction; in other words, which did not conduce to the death.

I may add, that it seems to me impossible to come to a different conclusion, without overruling *The Queen v. Phelps*; for overruling which case, I have found no good reason.

The question remains, whether the conviction on the present indictment was wrong, by reason of the mode in which the case was left to the jury. I incline to think, that the summing up was not strictly correct. For, notwithstanding that the assaults did not in any way conduce to the death of the deceased, the prisoners might have been in jeopardy of being convicted of them on the former indictment, but for the proof that some one unknown had committed the homicide charged against the prisoners.

which demonstrated that these assaults were not any part of the transaction which the Crown was prosecuting.

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The question, therefore, which was submitted to the jury, was not conclusive of the issue. It would have been so, if the ruling in *The Queen v. Crumpton* (a), (which the learned Judge appears to have followed) were law. But I consider that case to have been, in effect, overruled by *Birch's* case.

Still, I am of opinion, that the conviction was right. I think the learned Judge correctly laid down that the burthen of proof lay on the prisoners; who were to establish the truth of their plea. Now this could only be done by proving that they were in jeopardy on the former indictment, of being convicted of all the assaults included in the latter. But the evidence adduced (as it is stated in the case reserved) showed, according to the view I have taken of the operation of the statute, that they were not in such jeopardy. I think, therefore, that they failed in proof of their plea, and that they were properly convicted.

ERLE, J.—In this case the question turns upon the construction of the stat. 7 Will. IV. & 1 Vict. c. 85, s. 11. The words of that statute indicate that the assault in the conviction should be the assault included in the supposed felony, and the cases decide that a conviction for an assault, unless included in the felony in law, and connected therewith in fact, would be wrong.

Thus, upon a charge of felony in attempting to discharge a loaded pistol, an assault by blows, not involved in or connected with the presentation of the pistol, was held not to be included by law in the charge. *R. v. St. George* (b).

So, where an indictment for a burglary with an intent to ravish, contained a charge of an assault by blows, this

(a) 1 Car. & M. 497.

(b) 9 C. & P. 483.

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assault was held not to be included by law in such a charge of burglary. *R. v. Watkins (a)*.

So, where upon a charge of rape it was proved that the prisoner assaulted at one time, and that another man ravished at another time, the assault by the prisoner at a different time was held not to be connected in fact with the crime charged. *R. v. Gutteridge (b)*.

So, upon a charge of murder, an assault at a different time from that when the fatal blow was given was held not to be connected in fact with the charge. *R. v. Phelps and others (c)*. Also, where upon the same charge of murder there was some evidence that the prisoners were co-operating in the beating that caused the death, it was left to the jury to say, in effect, whether the acts of the prisoners had conduced to the death; if yes, the prisoners were guilty of the felony; if not, they were not guilty altogether; the evidence of the assault being equally evidence to prove the felony. *R. v. Phelps, Southan and Smith (d)*.

According to these decisions the summing up of the learned Judge now under consideration was correct, and his construction of the statute does not conflict with the principle which the Judges laid down in *R. v. Birch (e)*, with reference to the facts then before them; viz., that the assault intended by the statute must be included in the indictment, and must be part of the transaction which is prosecuted as a felony. In that case there was evidence of the prosecutor having been assaulted and robbed, and of the prisoner having taken part in the transaction when the assault and supposed robbery occurred; but the proof of the robbery was, in the opinion of the jury, imperfect. Under these circumstances a conviction for an assault, which upon the evidence, might have been a

(a) Car. & M. 264.

(b) 9 C. & P. 471.

(c) 1 Russ. 781.

(d) Car. & M. 180.

(e) 1 Den. C. C. 185.

part of the felony charged, was supported. In the present case, the cause of death being proved, and the assaults by the prisoners, which were in evidence, being also proved to be no part of the cause of death, and the cause of death being the transaction which is prosecuted as a felony, it seems to me that the assaults cannot be truly said to have been part of the transaction which is so prosecuted. The intention of the prosecutor to include them in the indictment is not alone sufficient to support a conviction, because that intention existed in the cases where the convictions were excluded. It is further to be observed that there is a distinction between the charge of assault in cases of rape, robbery, and felonious wounding, and that in cases of homicide by assaults. In the first class the charge relates to one transaction, which is probably a felony, and the assault in question is part of that transaction, and has its felonious character at the time of its committal. In the second class, on a charge of homicide by assault, the essence of the crime is causing death; the felonious nature of the assault arises from the retrospective effect of death, and in many cases of homicide the felony is equally complete whether death was within the intention of the prisoner at the time of the assault or not. If the assaults and death stand in the relation of cause and effect, the felony is proved; if they do not, the assaults are unconnected with the felony charged, and are no ground for a conviction under the statute. According to this reasoning the statute would not come into operation in cases of homicide by assault, and I believe it was not intended that it should. But if, after the decisions, this reasoning is not adopted to the full extent, still the interest of public justice seems to me to require that the application of the statute should be restricted to those cases only of homicide where the subject of prosecution is one transaction, where the death is attributed to a single occasion of assault, so as to be within the principle laid

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down in *R. v. Birch*. It is important for public justice to conduct trials for murder with unity of attention, to free the judge from the technicality in which we are now involved, and the jury from referring the evidence to three alternatives—murder, assault, and acquittal; but it is imperative to release a prisoner on such a trial from liability for various assaults. If he is liable to be convicted, of course he should have full notice and opportunity for defence. The death may be attributed to various counts, to various assaults, sometimes single, sometimes in a series. If the prosecutor is found to be mistaken in supposing the assaults conduced to the death, and the prisoner is to be acquitted of felony, it is contended he must then be convicted of all the assaults which have been proved; but the Legislature cannot have intended that the mistake of the prosecutor should justify an unfair trial; and the trial would not appear to me to be fair if the prisoner, when defending himself for murder, should be also called on for a contingent defence against charges for several alleged assaults in the course of several weeks, some of which may be open to contradiction, others to justification, and others to mitigation. The purpose of the statute was to prevent the delay and trouble of a second indictment for assault. In cases of homicide by several assaults, the saving would be effected by a sacrifice of justice. That construction of the statute is to be adopted which most avoids this inconvenience. The learned Judge adopted the construction of the statute, which gives it this restricted application, and his summing up is objected to on that account: but, upon the grounds above stated, the objection, in my judgment, fails, and the summing up ought to be sustained.

CRESSWELL, J.—The question now to be determined arises out of the enactment in 7 Will. IV. & 1 Vict. c. 85,

s. 11: "That on the trial of any person for any felony whatever where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." The crime charged means the felony charged, and that must be of such a nature that it cannot be committed without an assault. If the crime charged does not necessarily include an assault, I conceive that the case cannot be brought within this section by any express averment that an assault was committed. If the question were a new one, and I had been called upon to construe the enactment, without reference to decided cases, I should probably have been of opinion that it was intended to apply to those cases only where an attempt had been made to commit a felony which had not been perfected, and in making the attempt an assault had been committed. But it has been held that the statute ought not to have so limited a construction, and that a party indicted for robbery may be acquitted of that felony, and found guilty of an assault, although the jury negative any intention or attempt to rob. On the other hand it has been held that the enactment ought not to have the widest application of which the words are capable; but that the assault, to come within it, must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the Crown prosecutes as a felony by the indictment.

Those two points were ruled by the unanimous opinion of the judges in *The Queen v. Birch and another* (a). That case having been so decided, it is, in my judgment, much better to abide by it, whatever doubts I may entertain as to the construction of the statute, than to render the cri-

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(a) 1 Den. C. C. 185.

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minal law uncertain by reopening a question which has been decided by the whole body of Judges. If the decision of the whole body pronounced one year may be overturned the next, that reversal may again be overturned the following year, and such a course of proceeding would throw the whole criminal law into a state greatly to be deplored. I therefore abide by the decision in *The Queen v. Birch and another*, and hold that the assault of which a party may be convicted under the 7 Will. IV. & 1 Vict. c. 85, s. 11, must be part of the very act or transaction which the Crown prosecutes as a felony, but that it need not be committed in attempting to commit the felony charged.

The matter to be determined in the present case, then, is whether the assaults,—for which the Birds were indicted and tried before the learned Judge who has reserved this case for consideration,—were part of that act or transaction which the Crown prosecuted as a felony before my brother Talfourd on a former occasion. If they were part of that transaction, the prisoners might have been before convicted, and they cannot be tried a second time for the same offence; otherwise, the present conviction is right. On this part of the case, also, I have a decision of the whole body of Judges to guide me, for I cannot distinguish the case of *The Queen v. Phelps (a)*, from the present. In that case Phelps was indicted, together with two others, Southan and Smith, for the murder of Overbury by blows. Evidence was given that Phelps had struck the deceased more than once and knocked him down, but other evidence was also given which showed that those strokes were not the cause of death, and that Phelps had gone away a quarter of an hour or more before the blow was given to which the death of the deceased was ascribed. The late Mr. Justice Coltman told the jury that there was no evidence to support

(a) 2 Moo. C. C. 241; reported also in 1 Russ. on Crimes.

the charge of murder against Phelps, but that they might find him guilty of an assault, which they accordingly did. The case was left to the jury on the charge of murder as to the other two prisoners, and they were altogether acquitted. The propriety of the conviction of Phelps was reserved for the opinion of the Judges, who held that as the assault proved did not form a constituent part of the greater charge of felony, but was a distinct and separate assault, the conviction was wrong: they therefore decided that the assault so committed by Phelps was not part of the act or transaction which the Crown prosecuted as a felony by that indictment. Here the Birds were shown to have committed various assaults, but the evidence negatived their being the cause of the death of Mary Ann Parsons, which was ascribed to a blow inflicted at a subsequent time, and the party who inflicted it could not be ascertained; whereupon the learned Judge told the jury, and, in my opinion, rightly, that there was no evidence to establish the charge of murder against the prisoners; and the evidence then given showed that the assaults proved to have been committed by the Birds were not part of the act or transaction prosecuted in that case. Feeling, therefore, that the case of *The Queen v. Phelps* cannot be distinguished from the present, and that it was decided by the whole body of Judges for the reason given above, I should think it right to act upon it as a binding authority, even if I doubted the propriety of the decision. But it seems to me to be correct.

The act or transaction which the Crown prosecuted by the indictment for murder preferred against the Birds, was the act of killing Mary Ann Parsons of malice aforethought by blows. The indictment did not describe the particular blows by which the death was occasioned, and it was competent to the Crown to give evidence of any blows given by the prisoners, and to endeavour to show that they were the cause of death. But still the transaction prosecuted was

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the death, and the means by which it was occasioned; and when the evidence showed that the death was occasioned by a particular blow, and that the others before proved were not part of the same transaction, but wholly distinct and independent of it, the Judge who tried the prisoners was bound to withdraw them from the consideration of the jury on the charge of murder; and, as in *Phelps's* case, a conviction of those assaults would have been wrong. Nor can I discover that this view of the subject is inconsistent with *The Queen v. Birch* and other cases, where it has been held that although the evidence fails to show that the supposed felony prosecuted by the indictment has been committed at all, nevertheless the party charged may be convicted of an assault, for it may still be ascertained by evidence what is the transaction really prosecuted; *ex. gr.*, indictment for rape, evidence assault, indecent liberties, an apparent attempt to commit the crime charged, but no completion of it. The transaction is ascertained, and an assault being part of it comes within the stat. 7 Will. IV. & 1 Vict. c. 85, s. 11. So, in the case of an indictment for robbery, as in *The Queen v. Birch*, if there were evidence of one assault and nothing more, that would appear to be the transaction prosecuted. But, assume the evidence to be of an assault, and afterwards another and independent assault, and on this latter occasion money lost, the latter would appear to be the real transaction prosecuted; and the party, if acquitted of the latter transaction, could not be found guilty of the first and independent assault. I think, therefore, that upon principle and authority I am bound to say that the present conviction is right.

WIGHTMAN, J.—The question in this case, in substance, is whether the prisoners upon their trial before my brother Talfourd, upon the indictment which charged them with murder, could have been found guilty under the 11th sect.

of the stat. 7 Will. IV. & 1 Vict. c. 85, of any of the assaults charged against them by the indictment subsequently preferred against them, and to which they have pleaded *autrefois acquit*.

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The words of the statute are: "And be it enacted, that on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." It is perfectly clear that this clause was not intended to apply to every assault that might be proved against the prisoner upon a trial for a felony including an assault, though totally unconnected in time, place, or circumstance with the felony charged; and from the time of the passing of the Act its application has come into question in a great many cases, and there are dicta and decisions of individual Judges not easy, and it may be, impossible to reconcile, but I do not think it necessary or expedient to refer to more than four of them, two of which have come under the consideration of *all* the Judges, and two others, which, though only expressing the opinion of individual Judges, agree so exactly, as it appears to me, in principle with the two cases before all the Judges, as to the instances in which the statute may be applied, that I cite them as additional authorities for the conclusion to which I have arrived in the present case.

The cases to which I refer are *R. v. Phelps* (a), *R. v. Birch* (b), *R. v. St. George* (c), and *R. v. Crumpton* (d).

These cases differing in some respects in circumstances, all agree in the principle upon which the statute is applicable—that the prisoner can only be found guilty under the

(a) 2 Moo. C. C. 240.

(b) 1 Den. C. C. 186.

(c) 9 C. & P. 483.

(d) Car. & M. 600.

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Act of Parliament of an assault which was involved in and formed part of the act or transaction which was charged as a felony in the indictment. This is stated in terms by my brother Parke in *R. v. St. George*, in which he refers to the former case of *R. v. Gutteridge* to the same effect; and it is the opinion of my brother Patteson in *R. v. Crumpton*, and is that of all the Judges in *R. v. Birch* and *R. v. Phelps*.

Assuming then, that the principle upon which the question, whether a prisoner charged with a felony including an assault, can, if acquitted of the felony, be convicted of an assault, is settled by the cases to which I have referred, it only remains to apply that principle to the present case. The prisoners were charged upon the first indictment with the murder of Mary Ann Parsons, by beating, striking and kicking her at different times as stated in the indictment. The act or transaction charged as *a felony* was an assaulting and beating, which caused the death of Mary Ann Parsons. The death was proved by the prosecutors to have been wholly caused by a blow given very shortly before the 4th January 1850, but as there was no evidence that it was inflicted by either of the prisoners they were acquitted of the felony with which they were charged.

But it was proved in the course of the trial that on several days and occasions *before* the day when the fatal blow was given, the prisoners had assaulted and beaten the deceased, but those assaults were quite distinct and independent of the act or transaction which caused the death. It is true that the felony is charged to have been committed by beating—that the deceased did die by beating, and that the prisoners were proved to have beaten her; but the assaults and beating proved against them did not form part of the act or transaction *which was charged as a felony* in the indictment; the act or transaction charged was the assaulting and beating which actually caused the death.

The Crown prosecuted in respect of an assault and blows which caused death, and proved that at a particular time a blow was inflicted by some one, which did cause the death of the deceased; it was that blow, and that only, which caused the death, and was in fact, as it appeared by the evidence for the Crown, the act which was charged as felonious. The prisoners were not proved to have committed that act, nor were any of the assaults and beatings proved against them any part of the transaction which the Crown proved to be the cause of death, and were therefore not involved in, nor did they form part of the act or transaction which was charged as a felony in the indictment.

In *R. v. Birch and others*, the prisoners were indicted for feloniously assaulting and robbing the prosecutor, with violence. The evidence proved that the prosecutor was attacked by several persons and knocked down, and the prisoner was seen to strike him whilst on the ground with other persons about him also misusing him; but by reason of the absence of the prosecutor the charge of felony was not supported, but the prisoner was convicted of an assault under the statute; and held rightly, because the assault formed part of, and was involved in, the act or transaction which was charged as a felony in the indictment. It was clear that it was at that time that the felony charged in the indictment was committed, if at all, and the assault formed part of that transaction, and was involved in it. The distinction between that and the present case appears to me clear. If, in the present case, it had appeared that at the time the mortal injury was received, the prisoners were with the deceased, and had assaulted and beaten her immediately before, but that the evidence raised a doubt whether the mortal injury was occasioned by those blows, or by a fall which might be attributed to accident, and on that ground the jury had acquitted the prisoners of felony, I should think that they might have been convicted of assault under the

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statute ; for in that case the assault proved would have been involved in and formed part of the act or transaction charged as a felony in the indictment, and prosecuted as such ; and though the evidence failed to establish it as a felony it was the only transaction which was intended to be charged as felonious ; if that was not felonious there was no other ; but the assaults in question were wholly unconnected with, and independent of, the transaction which was proved on the part of the prosecution to have caused the death of the deceased, and which was the felony charged against the prisoners, and of which they might have been found guilty, if they could have been proved to have been actors in it. I may observe that the issue taken by the replication to the plea of *autrefois acquit* is, “ That the prisoners were not upon the previous trial acquitted of the felony and murder, including the same identical assaults charged in the second indictment.” For the reasons I have given, it appears to me that the felony and murder charged in the first indictment did not include the same identical assaults charged in the second indictment. The learned Commissioner, in charging the jury, told them that if they were satisfied that there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the Crown. The whole of this charge is hardly correct, as the question is not whether the assault conduced to the death of the deceased, but whether it was part of the very act or transaction which was charged as a felony in the first indictment. But this is not a case for a new trial, and the question substantially is, whether, notwithstanding this defect, if it be one, the verdict is, under all the circumstances right ; the charge directs the jury to the main point, whether the assaults were distinct and independent assaults, clearly meaning distinct and independent of that which was involved in and part of the act or transaction charged as a

felony by the prosecution, and upon the great point seems substantially correct; and it would be too much to set aside a verdict fully warranted by the evidence, because upon a critical examination of the Judge's charge, there may have been a partial defect; the charge, upon the whole, is substantially correct:

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I am therefore of opinion that the prisoner could not, consistently with the principle which I have already stated, have been convicted, upon the first indictment, of those assaults which were the subject of the second indictment; and that the verdict which has been found for the Crown is right:

MAULE, J.—I am of opinion that the prisoners were entitled to an acquittal. The prisoners, who were indicted for an assault, having pleaded that the assault was comprehended in the indictment for murder, which was denied, the question which we are now called upon to determine arose. It seems to me, upon the evidence, and, indeed; upon what is not at all disputed by anybody, that the assaults charged upon the second indictment were assaults comprehended in the felonious violence charged upon the former occasion. Now the prisoners upon the former occasion were indicted for murdering Mary Ann Parsons by beating. There were a considerable number of counts stating various assaults, and stating, as the result of them, that the girl was murdered. Upon the second occasion, no doubt was raised at all that the assaults for which it was intended to try the prisoners were the very same assaults that had been given in evidence upon the former occasion, and which were comprehended in some of the counts of the indictment upon that occasion.

The crime charged is, I think, to be determined by looking at the indictment; the indictment is the legal charge,

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and there the crime is charged in several counts comprehending assaults, comprehending different assaults, comprehending, according to concession, those very assaults for which the prisoners were secondly tried. They were acquitted upon the first indictment, and they were no doubt entitled to be acquitted upon the evidence given before my learned brother Talfourd, J., upon that trial; and no doubt could ever have entered into the mind of anybody who knew anything about the matter, that they were entitled to be acquitted of the murder upon all those counts, and they were, in fact, acquitted upon all those counts; and they were acquitted of everything which could have been proved under any one of those counts. Now putting aside the grave doubt which has been raised by two of my learned brothers, at least, whether upon any indictment for homicide, according to the true intent of the statute, you could convict of assaults, and assuming that you could, (which I think we must do) then it seems to me that upon every one of those counts in that indictment (in whatever way they were dealt with by the Counsel for the prosecution upon that occasion) the prisoners were entitled to the full benefit of the acquittal; that is, just to the same benefit of acquittal as the prisoners would have been entitled to, if any one of those counts had stood alone. I cannot at all understand, upon the assumption that I have already made, how you can make a distinction between the different counts of the indictment. I do not know that any distinction is actually made. Suppose any one of them had stood alone; for the sake of simplifying the matter, suppose the count charging an assault on the 5th of November, which was said to have ended in the felonious death of the deceased had stood alone, and the evidence had been given which was given in respect of the death, and the jury had been of opinion that death had been

produced by that assault, they might have convicted the prisoner under that one count for murder or manslaughter; and if the jury might have convicted the prisoners of any of the assaults, they must be taken, I think, to have acquitted them of the whole.

There may be some inconvenience arising from whatever construction is put upon this act; and that the point itself is doubtful, I think is demonstrated by the fact that there are so many of the learned Judges entertaining an opinion contrary to that which I entertained myself—otherwise, I certainly should have thought that it was a clear point enough. Upon the former occasion the indictment stated in general terms indeed, but in terms which it is not at all questioned were intended to comprehend, and did comprehend, the particular transactions given in evidence on the part of the prosecution at the trial. The indictment charged those very acts in several counts, and those very acts charged in those counts were before the jury, and whether it was assault or whether it was felony, (I cannot see any ground for the reasoning which has been urged, that where there has been no felony you cannot convict of assault; that is contrary to every day's practice,) it seems to me, that it was quite competent for a conviction of assault to have taken place, and that therefore the parties were tried a second time for the same offence.

The acquittal upon the former occasion seems to have taken place very much by the consent of all parties. The case seems to have failed as to the murder, and after that was decided a conviction of assault was not pressed; and indeed it is not very usual in cases of indictment for murder to press for a conviction of assault. It is very seldom indeed that I have known it pressed for, which is perhaps an argument in favour of the convenience of the

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interpretation which some of my learned brethren have suggested, and which might perhaps be properly adopted if we were not bound by contrary decisions.

I think that the prisoners had been formerly tried and acquitted of that of which they have been convicted upon the second occasion, and therefore that the conviction is bad.

COLERIDGE, J.—I have considered this case with all the attention which the known conflict of opinions upon it among the Judges made it proper for me to bestow; and, although I cannot say that I have arrived at a conclusion free from all doubt, yet upon the whole I think that the conviction was right.

The question depends on the true construction to be put upon the words of the statute, that “at the trial of any person for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding.” These words are very general, and yet as justice requires, so I think from the very words, if closely examined, some limitations will be found clearly implied upon their generality, and these it will be right to point out.

First. I remark the change of language from “felony” to “crime charged.” The first points to the species, the second to the individual case, and that case must be “charged;” *i. e.*, expanded in statement on the indictment. The statute therefore applies only where the individual crime, being a felony in itself involving an assault, shall, as it is charged on the face of the indictment, include an assault on the person; and the whole charge will be compounded of the assault, and all those circumstances,

whether of act, intent, or consequences, which go to make the felony complete—these, with the former, altogether making one whole.

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The statute then proceeds to say, that in such case the jury may “acquit of the felony” and find a verdict of “guilty of assault.” Whether this means that they may first acquit of the whole charge as preferred, and then, looking at the facts composing it, select one, and find the prisoner guilty of the assault as a new charge, or only that they may acquit of the felonious part of the charge and convict of the assault which formed the other part, is immaterial; for in either way the assault of which they find guilty must clearly have been that which was involved in and made part of the one entire crime charged on the face of the indictment. No one reading the section, and at all accustomed to the rules of legal interpretation, would suppose that any independent assault, though receivable in evidence it may be as conducing to the proof of the prisoner’s guilt, could be made the subject of the verdict; that would be to convict the prisoner of an offence with which he had never been charged, against which he had never in fact defended himself, and which he could not be supposed prepared to do.

Thus far seems clear. But a further question is raised upon the words “acquit of the felony.” An acquittal may take place where one prisoner only is charged, either because the proof fails to show that any felonious act has been committed, or because the act appearing to be felonious is not brought home to the prisoner; and when more than one prisoner is charged also, because he is not proved to have taken part in the act, which, as to all or some of those charged with him, is found to be felonious. The statute does not in terms regard these distinctions; nor do I think it material to follow them out; because, if they at all affect

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the application of the statute—i. e., if the statute does not apply to all cases of acquittal, but only to some—it will be found, I am convinced, if the inquiry be fully followed out, to depend on this ;—whether on the given ground of acquittal the assault could or could not be part of the whole crime charged as felonious. It seems to me too, I own, that to make this directly the test of the applicability of the statute leads to a more technical, or, if it be thought a fitter expression, a more strictly scientific rule of construction, than is proper for the occasion ; for I conceive it clear, that the statute was framed to meet a commonly occurring evil of the entire escape from punishment of one who was clearly guilty of a part of the charge because he was not found guilty of the whole, and that in framing their remedy for this, the framers were not careful to observe the precise conditions of the existing criminal law : indeed the remedy is founded on an avowed innovation upon it. Whether this might have been avoided, or had better have been avoided, is not the question : our duty is to interpret the statute as we find it, and bearing this in mind,—in order the better to fulfil its intents.

But recurring to that which I consider the true and more expedient test, whether in any given case a party acquitted of felony may be found guilty of assault—the test, namely, whether the assault of which it is proposed to find him guilty, formed part of the whole crime charged as felonious—the question still arises, how are you practically to ascertain that ? And here I think it most convenient to introduce the case of *R. v. Birch and Hardy (a)*, because the resolution in that case brings us down to that point in the inquiry at which I have now arrived. The Judges there are reported, according to the manuscript

(a) 1 Den. C. C. 185.

note of my brother Parke, to have thought "that the enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony; nor was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault." But they were of opinion, that "in order to convict of an assault under the section, the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the Crown prosecutes as a felony by the indictment."

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The rule here laid down is the same to which a mere consideration of the words of the statute, unaided by any decision, would have brought me. But then arises the question, how in any given case it is to be ascertained whether the assault on which the verdict is to be allowed to pass was "included in the charge and on the face of the indictment," and also whether it be "part of the very act or transaction which the Crown prosecutes as a felony by the indictment." The generality of the language of our indictments makes it impossible to determine the first question merely by looking to the face of the instrument. We can learn no more from that than whether *any* assault is charged or not; what assault; when, where, or how committed: all particulars, in short, from which identification of charge and proof as to specific assaults could be made out are left entirely unascertained by that—a state of things at first sight difficult to reconcile with the theory of pleading, with however little inconvenience it may be found to work in practice.

Again, it would not be right to let the determination of the second question depend upon the opening speech of Counsel for the Crown, nor on the course he may pursue in conducting his case: often there is no opening speech, often no Counsel for the Crown. But, assuming there were both in all cases, it could not be left to the Counsel merely

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by stating the assault in the opening, or offering evidence of it in the course of his proof, to make the prisoner liable to a verdict for it, unless the circumstances were such as really brought it within the scope of the statute.

It seems to me however, I own, that there is more seeming than real difficulty in a practical application of the rule as it is laid down in *R. v. Birch*. In the first place the indictment must be supposed to have alleged an assault or assaults (it is immaterial which), and one or more must be supposed to have been given in evidence. It must be supposed, too, that when the evidence is closed the Judge, by the light that it affords, will have been enabled to see what act or transaction it is which it has been intended to prosecute as a felony by the indictment (for that which he has in fact attempted to substantiate the Counsel must be taken to have intended to prosecute); and with that knowledge, how shall the Judge have any difficulty in seeing whether there is any evidence to connect the assault or assaults proved with the felonious act or transaction which it has been sought to prove? It is the province of the Judge on all trials to determine whether there is any evidence to prove an issue; and the connection I now speak of is in the nature of an issue. If there be evidence, the question for the jury will be, do they believe it, and also the fact of the assault; and if they believe both the prisoner will be found guilty under the statute. Of course what the nature and extent of the connection must be to satisfy the statute—what the evidence, whether of time, place, intent, or other circumstance to make it out—the Judge would have to point out to the jury. If there be in the Judge's opinion no such evidence, this matter could never go to the jury.

Every case of this kind supposes an acquittal of the prisoner of the felony charged; but it has been thought that distinctions may arise according to the ground of acquittal.

Now this may be either because the jury think no felonious act has been committed at all; as, in case of murder, that the deceased has died from natural causes; or in robbery, that no money or chattel has been taken from the prosecutor; or because they think the felonious act is shown to have been committed by some third party with whom the prisoner is not so connected as to be a felonious accomplice; or because, simply, they think the act or the felonious intention not satisfactorily brought home to the prisoner. But in all these cases, equally, the *prisoner* is disconnected with the felonious charge. The acquittal in all is simply that he is not guilty. A felony supposed to be committed by another or not proved as to him, is, as to him and as to the charge in hand, as much no felony as if none had ever existed at all; and, therefore, in all these cases the supposed assault is equally disconnected with the felony—it can form no part of that which, by the assumption, does not exist at all. But it is obvious that this cannot prevent that sort of connection which the statute requires, because if it did the statute, which applies only in cases of acquittal, could have no operation at all. The ground of acquittal may indeed often, in individual cases, show that the statute cannot be resorted to; but it will not, I conceive, ever make the application of the rule, according to the course I have sketched out, impracticable.

I have forbore in these remarks from citing cases, with the exception of that of *R. v. Birch*, on which I have dwelt, for the obvious reason that it was one decided by the assembled Judges in which it was attempted to lay down a rule for future guidance. I have considered myself bound by that case, and my only object has been to understand and apply it. Decisions of single Judges, with all the sincere respect I feel for those who have pronounced them, I think, are not entitled to much consideration, where, as in the

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present case, we are trying the rule laid down by the body, and seeking to illustrate and apply it.

There is, I think, but one other case decided by the Judges upon the section; one so remarkably like the present that I am unable to find any substantial difference between the two. I mean the case of *R. v. Phelps* and two others (a). Like this, that was a charge of murder against more than one person, all charged as principals in one count, and the death alleged to have been occasioned by striking and beating. All were acquitted of the felony. There was evidence against two that they were present at and took part in the violence which occasioned the death, but Phelps, who had struck the deceased several blows, had gone away from fifteen to thirty minutes before the violence was committed. The learned Judge who tried the case seems, from the report in Carrington and Marshman, rather to have assumed that if this evidence against Phelps were believed, he might be found guilty of assault, and he was so convicted. But the Judges were unanimously of opinion that the conviction was wrong: they assumed, in fact, that it was a distinct and separate assault; and they laid down, in substance, the same rule as that afterwards propounded in *R. v. Birch*, viz., that to bring a case within the statute "the assault must be such as forms one constituent part of the greater charge of felony." Neither report is full enough to enable one to say whether there was any evidence to connect Phelps's assault with the fatal and felonious violence of other persons, such as to make it part thereof without making him guilty of the felony; if there were, the result only would have been different but the rule the same. Even if I thought this case wrongly decided, I should not feel that we were at liberty, divided as we are in opinion,

(a) 2 Moo. C. C. 240; S. C., Car. & M. 180.

to overrule it; uniformity of decision, if it be important in any Court or in any branch of the law, is above all important in this Central Court of Criminal Appeal and in this branch of our law. But it is a great satisfaction to me, after much doubt and fluctuation of opinion, that I can concur with it entirely and have the benefit of its authority.

My judgment is already so much longer than I could have wished, that I will not prolong it either by applying what I have said at any length to the case before us, or by any consideration of the objection made to the direction of Mr. Gurney. In my view the latter cannot be necessary, for it resolves itself into the main point; and in any view the former may be dispensed with after the judgments already pronounced, and where we all are so familiar with the facts and the questions we have had to consider. I will only say that the assaults given in evidence on the first trial, respecting which the present question has arisen, appear to me to have been so entirely and unquestionably severed from the felonious act or transaction of which the prisoners were acquitted that my brother Talfourd was perfectly justified in not submitting them to the jury. I am, therefore, of opinion that the present conviction was right.

PATTESON, J.—Two questions appear to me to arise in this case; first, whether the prisoners could have been convicted, upon the former trial, of all the assaults charged in the present indictment; and, secondly, even supposing that they could not, whether the proper points were put to the jury by the learned Judge upon the present trial.

The former indictment contained several counts. In some a single act of assault and murder was charged: in others a series of assaults on different days, causing together the death of the deceased, and constituting the crime of murder. It is plain that one felony only is charged, from the nature

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of the crime—murder of one individual; it is impossible that the counts could be treated as charging separate felonies, and the Judge could not be called upon to put the prosecutor to his election.

By the evidence it appeared that the death arose exclusively from one assault and wound, shortly before the death, and that all the other assaults were unconnected with the death. The infliction of that assault and wound was not brought home to either of the prisoners, consequently they were entitled to be acquitted of the murder, and of the assault which really caused the death. But several assaults were proved against them, prior to that which caused the death, though unconnected with it; and whether they might have been convicted of those assaults is the question.

The stat. 7 Will. IV. & 1 Vict. c. 85, s. 11, provides that “on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault, against the person indicted, if the evidence shall warrant such finding.” I do not think that this clause is to be confined to such crimes as necessarily include an assault, as rape, robbery, wounding with intent to murder, and such like. If it were so confined, murder and manslaughter would not be within it; for they may be committed without an assault, as by poisoning or negligence. I am satisfied that the clause extends to those crimes, which in their nature, may or may not include an assault; and which are charged in the indictment as so doing.

The words of the clause are very general, and might, at first sight, be supposed to warrant a conviction for assault where the proof of the felony failed; whether that assault were connected with the supposed felony or not, and at

whatever time, however distinct from the time of the supposed felony, it took place. But the manifest injustice of so construing them has made it necessary to put some limitation upon their meaning; accordingly, many cases have occurred in which learned Judges have felt themselves bound to lay down what they considered to be the true limitation.

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Those cases were cited and commented upon when the present case was argued, and I do not propose to enter into a detailed examination of them. They are, for the most part, decisions of single Judges on the circuit; entitled certainly to have full weight given to them, and assisting us greatly in coming to a right conclusion upon the present case, in which they are in some measure brought under review. They are for the most part cases in which the felony charged has included a single assault; and they lay down the rule, that in such cases there can be no conviction for an independent assault at a different time, because such assault can, by no reasonable construction, be treated as the assault included in the felony charged.

There are, however, two cases reported which have been brought under the consideration of the whole body of Judges, and from them I apprehend the rule may be and ought to be taken. I allude to the cases of *R. v. Phelps and others* (a), and *R. v. Birch* (b).

In the case of *R. v. Phelps and others* (c), Phelps and two others were indicted for murder. It turned out in evidence that Phelps, after having assaulted and knocked down the deceased, ran away; and that the deceased was afterwards assaulted and killed by some other persons, supposed to be the other prisoners. The two assaults were not connected together. The learned Judge left to the jury the question whether the other two prisoners were

(a) 2 Moo. C. C. 240.

(b) 1 Den. C. C. 185.

(c) Reported also in C. & M. 180.

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guilty of manslaughter, and told them they must acquit Phelps of the felony, but find him guilty of assault. They found the other two prisoners not guilty, and Phelps guilty of assault. But upon reference to all the Judges, it was held unanimously, that Phelps, could not under the circumstances be convicted of assault. In that case, as in the present, there was an assault which caused the death, but it was not proved against any of the prisoners. There was, as in the present case, an unconnected prior assault proved against one prisoner ; but it was held by the Judges, not to be the assault included in the felony charged by the indictment. Yet in that case, as in the present, the assault committed by Phelps was supposed, by the framer of the indictment, to be connected with the death, and was proved by the Crown, and attempted to be connected with it ; and it was shown by the evidence, which was believed by the jury, that it was disconnected with the death. The whole matter remained in doubt till the jury found their verdict, by which they acquitted all the prisoners of felony, not because they did not believe that a felony had been committed by some one, but because it was not proved against any one of the prisoners. If they had believed the assault committed by Phelps to have conduced to the death, they must have found him guilty of manslaughter. The indictment alone, therefore, does not afford the test as to whether any assault that is proved is included in the felony charged, but that question depends upon the indictment coupled with the evidence. I confess I am unable to distinguish the case of *R. v. Phelps and others*, from the present case.

But it is stated that the authority of that case has been shaken by the subsequent case of *R. v. Birch and others*, which is reported in 1 Den. C. C. 185, and erroneously said to have been tried before me, whereas it was tried before Mr. Armstrong, Q.C. So

far from this case shaking the authority of the former one, in my judgment it entirely confirms it. That was a charge of robbery. The prosecutor did not appear, and there was no proof of the robbery: but a witness who saw the transaction proved an assault, and the jury not having any evidence of an intent to rob, found the prisoner guilty of common assault. There was but one transaction proved, and there could be no doubt that it was the same transaction which was supposed to be, and for which the prisoner was indicted as, a felony. Mr. Armstrong stated a case for the opinion of the Judges, and they held the conviction for an assault right. In the report it is said,—“The Judges thought, upon consulting all the authorities, that the enactment in the statute was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault. But they were opinion, that in order to convict of an assault under this section, the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the Crown prosecutes as a felony by the indictment.”

This seems to me to be in exact accordance with *R. v. Phelps and others*. No difficulty can ever occur, as it appears to me, where the felony charged cannot, from its nature, or does not, in the manner in which it is charged, include more than one assault. One single transaction will be inquired into, and if the prisoner be proved to have been involved in that transaction, the quality of his act, whether felony or assault only, will be the main question. If the evidence satisfies the jury that the assault alleged was felonious, but fails in fixing the prisoner as the person committing it, he must be acquitted altogether, and cannot be found guilty of an independent assault committed at another time.

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I cannot collect from the language used in the statute, nor can I conceive that the legislature intended, that where the evidence establishes the commission of a felony including an assault by somebody, the jury can ever be at liberty to convict of an assault only. In such case, either the prisoner must be guilty of the whole charge, or if he be not proved to be the guilty person, he must be acquitted of the whole. Any other assaults proved against the prisoner cannot be taken to be "part of the very act or transaction which the Crown prosecutes as a felony," merely because, in drawing the indictment they have been so charged wrongly, and contrary to the real state of the facts. There being a felony proved by the evidence, if the assaults proved against the prisoner be connected with that felony, and conduce to it, the prisoner is guilty of felony; if they be not so connected, they are no part of the very act or transaction which the Crown prosecutes as a felony.

If indeed, the very act or transaction which the Crown prosecutes as a felony, turns out by the evidence not to be felonious, and so no felony at all is proved, then, if the assault be proved against the prisoner, he may be acquitted of felony and convicted of assault. And this may be the case even in murder or manslaughter, for it may happen that the prisoner had severely assaulted the deceased, and the death may have been supposed to have been the result of such assault, and the prisoner may have been indicted for murder or manslaughter under such a supposition, yet it may turn out in evidence that the deceased died from natural causes not occasioned, nor even aggravated or in any way affected by the assault proved, and in such case the prisoner might, I think, be convicted of an assault; and I doubt whether the case of *R. v. Crumpton (a)*, was rightly decided, there being in that case, in truth, only one

(a) Car. & M. 597.

assault proved. So that the view I take of the statute would not make it impossible even to convict of an assault on an indictment for murder or manslaughter, though it would be very unlikely that such a case should occur. I do not, however, mean, that even if such a consequence did necessarily follow, it would alter my view of the statute. I found my opinion upon what I believe to be the true meaning of the statute, and upon the authority of the two cases to which I have particularly referred. I think that the question, whether the jury can find a verdict of guilty of assault depends, not merely on the indictment or on the course adopted by the prosecutor at the trial, or on what he may have attempted to prove; but on the indictment coupled with what was actually proved, and the conclusion which the jury come to on such proof. I find, that in this case the death was shown to have arisen exclusively from one blow and assault, not proved to have been committed by the prisoners; that the assaults committed by the prisoners were prior to that blow, and, in fact, unconnected with the death—no part of the very act and transaction which caused the death, and therefore no part of the very act or transaction which the Crown can fairly be said to have prosecuted as a felony; especially as the act and transaction which did really cause the death was an assault, and was laid in the indictment, but not brought home to the prisoners. If it had been brought home to them, they must have been convicted of felony; it is impossible that they could have been convicted of assault only for that assault which was really included in the felony charged; and I cannot, therefore, see how they could have been convicted of the other assaults charged which were not really included in the felony charged, merely because the framer of the indictment chose to insert them in it.

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If I am right in my view of this case so far, then I think

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that the learned Judge's summing up was right. The second jury, not being bound by the finding of the first, might have found that the assaults proved on the second trial were connected with the death, and if so, a great difficulty might have arisen. The point, therefore, was important to the prisoners; it might have been in their favour if found differently from what it was; it could not prejudice them, if found as it was. Again, even if it was wrong to put the point, it was immaterial, for it lay on the prisoners to prove their plea, and, in my opinion, they failed altogether in doing so.

Upon the whole, I am clearly of opinion that the conviction is right.

ALDERSON, B.—I am of opinion, in this case, that the prisoners are entitled to the judgment of this Court in their favour.

I had thought that this question had been concluded by the opinion of the Judges, delivered in *R. v. Birch and others*, till I heard the opinions of my learned brethren to the contrary. But, as it is now clear that the law on this point is still unsettled, it will be proper to discuss the case on principle, and to try to construe the statute itself before we examine the cases, which it must be allowed are not altogether consistent. The words of the statute are these: "On the trial of any person for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding."

It is clear, first, that the words "crime charged" mean crime charged as a felony, for the enactment only takes effect upon an acquittal of the felony; secondly, it is clear that the crime charged as a felony must be one which neces-

sarily includes an assault. In other words, the assault to fall within the Act must be an integral part of the felony.

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It is not necessary that it should be expressly charged on the face of the indictment. It will be sufficient if the felony charged must of necessity include an assault. The crimes of rape, and of cutting and wounding with intent, &c., are instances of this latter proposition; although there it is not unusual, and perhaps it is better, expressly to charge an assault in the indictment. But in murder and manslaughter it is necessary to do so, for murder and manslaughter do not necessarily include an assault. The cases of death by poisoning, or by criminal omission, are instances of this.

We must therefore, in all cases, look to the charge in the indictment to determine the point. Now in the cases where the indictment charges an assault, it does so for the most part in such general terms, that it is sometimes impossible by merely looking at the indictment to identify the particular assault which is charged as an integral part of the felony.

We must, therefore, often have recourse to the evidence given at the trial to identify the assault. As soon as we do this, we obtain in those cases an immediate criterion. Let me suppose a case of rape. In evidence, there is given an attack upon the female by beating her. If this be connected directly with the act of obtaining possession of her person, it is an integral part of the crime charged. So again, in a charge of felonious wounding, no assault, not producing a wound, is any part of the crime charged as the felony. It might indeed be receivable in evidence in order to show a common purpose, and so to connect the person who assaulted with the felonious act of the other who wounded. But, if it fails to do that, then such an assault is not within the provisions of the statute, for the very state-

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ment of the assault as proved disconnects it with the crime charged.

But suppose in these cases that there are assaults connected with the actual charge, and which actually go to the jury as a part of it, but the jury are not satisfied that the rest of the charge is made out, then the statute does apply, and the verdict of assault may follow upon such proof given, and the party may be punished for the assault mentioned in the indictment, identified by the evidence and left to the jury as a part of the felony. Thus, in *R. v. Brimilow (a)*, a case of rape:—a boy was shown to have attacked a girl for the purpose of obtaining possession of her person, but being under fourteen, he could not be by law, as it is said, guilty of rape. He was found guilty of assault, and yet he was incapable of committing the felony at all. But the assault was an integral part of the rape, which was erroneously charged against him. So again in murder:—the indictment charges a murder by an assault, by which a mortal injury was given. An assault is proved, but it is doubtful whether it caused death, or whether the deceased died by some pre-existing cause alone. Surely this assault is part of the charge of murder. It must be left to the jury in order to determine the guilt. Nothing separates it from murder but the verdict. If opposing evidence as to the fact of its causing or not causing the death be given, this assault, as part of the murder, put the accused in immediate jeopardy of life. And is it possible to make a legal principle out of the more or less clearness of the evidence as to the assault having caused the death?

But, if this be true of an assault (and I really do not see how the case I put can be doubtful; I am sure I have known it the constant practice ever since the statute), how

(a) 9 Car. & P. 366.

are we to distinguish one assault from several assaults? If the death be charged as being caused by these assaults combined, it is surely the same as if caused by one alone. The several assaults then become as much integral parts of the charge as the one assault was before. And for this I have to cite, in addition to the reason of the thing, the very high authority of my brother Patteson, *R. v. Thomas Cruse and Mary his wife* (a), who were charged with causing a bodily injury, dangerous to life, to a poor girl of tender age in their service; first, by striking and beating her with their hands and fists; secondly, by kicking her in the back; thirdly, by seizing and lifting her up and striking her head against a wooden beam; and, fourthly, by casting and throwing her on a brick floor. In that case there were four distinct assaults. The intent to murder, however, not being made out to the jury's satisfaction, the crime charged was not a felony. But the prisoners were found guilty of assault, for the assaults were all parts of the crime charged; and this ruling of my learned brother was supported by all the Judges on the case being reserved. How does this case differ in principle from the one now before us? Here several assaults between two particular days named in the indictment were charged as together causing death. There several assaults were charged as producing a bodily injury, dangerous to life. Here the assaults causing death were charged as having been committed of malice aforethought. There the assaults producing a dangerous bodily injury were charged as committed with intent to murder. If the assaults in *R. v. Cruse and wife* were part of the crime charged, the assaults in *R. v. Bird and wife*, which fell within the days limited by the indictment, were part of the crime charged also. Bird and wife therefore were in jeopardy, under the indictment for murder, of being punished

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(a) 2 Moo. C. C. 53.

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for these assaults, though not for any other assaults not included within the limits of the days fixed by the indictment. If so, the acquittal being general, *cadit quæstio*; they may plead that acquittal in bar of a second indictment.

But, I understand, that some of my learned brethren conceive that the two cases are distinguishable on the ground that, in the case of *R. v. Bird and wife*, there was given in evidence a particular blow which did cause death, and that so there was a separate felony proved, though not one committed by the prisoners. But this is, I conceive, a fallacy. If the special circumstances of that blow are unknown (and that they are so is quite clear), who can properly say that such blow was felonious? To say so is in the nature of a *petitio principii*. Such a blow by an unknown hand is in law undistinguishable from a disease causing death, or any other circumstances for which the prisoners are not responsible; and, if the blow is attributed to a third person, that person has no means of coming before the jury to explain the circumstances of the blow. This therefore is, I apprehend, a distinction without a difference.

I conceive then, that the statute applies in all cases where the crime charged consists necessarily of an assault, and something more, which "something more" converts the assault from misdemeanour into a felony. Thus, if we analyze a charge of cutting and wounding: it is, first, a wounding which necessarily includes an assault; secondly, it is with one of the intents mentioned in the statute. Now the first, if proved alone, still leaves the case a misdemeanour; it is the finding of the second, which alone makes it a felony. The jury in acquitting of the felony, may therefore find the first, if proved, which is an assault. The crime of manslaughter by violence in like manner, if divided, is first an assault; secondly, an assault which causes death. Of these two the felony is composed. If the second be not found, the first is an assault; if the

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second be found, it must in all cases be felony. If therefore, no one can be found guilty of assault, unless it be an assault which caused death or contributed to cause death, the statute can never apply to any case of murder or manslaughter at all. But, surely it would be wrong so to construe the statute; for the statute says, "any felony whatever, in which the crime charged includes an assault." It would be a strange construction of it, (unless we are to decide upon some supposed spirit or intention of the Legislature, casting aside the letter altogether) to say that manslaughter by violence, a crime which clearly is a felony, and which as clearly includes an assault, is not within these express words. But this was in substance the criterion put by the learned Commissioner to the jury, when he summed up the facts on this plea.

On this narrow ground alone of the misdirection, I conceive that this conviction is clearly wrong; because the proper question was not put to the jury. But I wish also to express my opinion on the more general question. I proceed therefore to advert to some of the cases; and first, to *R. v. Watkins* (a), which seems to me to have been decided on right principles, although I entertain a doubt, whether a clause in the 7 Will. IV. & 1 Vict. c. 86, s. 2, not adverted to apparently, might not make it proper to reconsider the particular case, if it should occur again. There the prisoner was charged with breaking and entering a dwelling-house with intent to commit a rape, and also with assaulting J. S., being in the dwelling-house. The Judges, when the case was reserved, thought that the whole felony consisted in the burglary, and that the assault was only an aggravation; and so they held the assault no part of the crime charged as felony, and the conviction of assault wrong: I agree entirely with the principle, though, I doubt whether, after

(a) 2 Moo. C. C. 217.

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the statute 7 Will. IV. & 1 Vict. c. 86, s. 2, expressly made the whole charge (including the assault) a capital felony, the verdict ought not to have been sustained.

To the above cases may be added the case of *R. v. Gutteridge (a)*, and the case of *R. v. St. George (b)*, where the law was, I think, clearly laid down by my brother Parke.

On the other hand, reliance is placed on the case of *R. v. Phelps (c)*, which it is said cannot be reconciled with the above view of the law. On looking at that indictment, which is to be found in C. & M. 180, I find that the murder there was charged by striking and beating the deceased. The point made was, however, that the assault by Phelps was altogether disconnected with the felony; and the Judges decided that of this he was improperly convicted, and I apprehend that their decision may be explained thus:—At the close of the case, there were two separate and distinct charges before the Court, one of assault by Phelps alone, and another of a joint felony at another time by Southam and the third prisoner. Now the Judge ought not to have put both to the jury—and if, as was his duty, he put one only, it was clear that he ought to put the felony to them; Phelps, therefore, ought to have been acquitted altogether. It is not like the case of one wounding, which may be a felony in one and a misdemeanour in another; according to the proof, or failure of proof, of the intent with which the act was done. There, only one act goes to the jury for their decision. On this ground *R. v. Phelps* may well stand as an authority without affecting this case; and upon the same principle Lord Chief Justice Tindal acted when he determined the case of *R. v. M'Phane and others (d)*. There also three prisoners were indicted for feloniously wounding. As to two of them,

(a) 9 Car. & P. 471.

(b) *Ibid.* p. 494.

(c) 2 Moo. C. C. 240.

(d) C. & M. 212.

a joint act of wounding was proved; but at this act the third prisoner was not present, nor did he concur in it. He afterwards committed another assault on the prosecutor. Lord Chief Justice Tindal left the joint felony to the jury, and directed the third prisoner to be acquitted altogether.

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I cannot, however, agree with the decision on which, in this case, my brother Talfourd very naturally acted at the first trial; I allude to *R. v. Crumpton (a)*, decided by my brother Patteson. That was murder by a course of ill usage, including a beating expressly charged in the indictment. That beating was proved, though it did not contribute to cause the death; but surely it was part of those acts which were altogether charged as causing death, and so producing the murder. It is not to be presumed, as my learned brother is reported to have said, that this would lead to a fraudulent insertion in the indictment of an assault wholly disconnected with the charge. We cannot act on such a presumption.

Indeed, it may perhaps be a little doubtful whether an assault charged as having with other acts not *ejusdem generis* caused together the death, would not be so integral a part of the charge as, if not proved, to entitle a prisoner to an acquittal on the ground of a variance as to the mode of death charged in the indictment.

These two cases form the main difficulty no doubt in determining the present question. They were both prior to the case of *R. v. Birch and others*, and I think that that case, properly read and understood, decides the present question. I do not, however, mean to discuss that case now. It has been already sufficiently adverted to by my learned brethren. Upon principle therefore and the true construction of the statute, added to, as I think, a great

(a) C. & M. 597.

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preponderance of authority as to that construction, I have come to the conclusion that in this case the defendants are entitled to a judgment in their favour.

PARKE, B.—The question submitted to us by the learned Commissioner of Oyer and Terminer and Gaol Delivery in this case is, whether he was right in the direction he gave to the jury.

The mode in which he states the question to have been left was this: after telling the jury that the burden of proof lay upon the prisoner, he directed, that if they were satisfied that there were several distinct or independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the Crown.

I am of opinion that this was not the true mode of leaving to the jury the only question in issue; viz., whether the prisoner was acquitted of the felony and murder, including the same identical assaults charged in the present indictment. The proper question is, whether the prisoners could have been lawfully convicted on the former indictment of all the assaults charged in this, and whether they were charged by that indictment with those assaults. The first branch of that question being matter of law for the Judge, and the second a question of fact for the jury.

In order to support the plea of *autrefois acquit* in all cases, both these circumstances must occur. It is not enough that the prisoner could have been lawfully convicted on the first indictment for the offence charged in the second; for if so, as the language of an indictment describing any offence, is in general not material as to the date or place, or many other circumstances if in the same county, the indictment would be equally descriptive of many offences of a similar character—and an acquittal of the offence charged on one indictment describing it in proper terms,

sufficient in point of law, would be an acquittal of every offence of the same sort in the same county against the same person; but in order to constitute a good plea of *autrefois acquit*, the plea must state, and it must be proved that the offence charged in the former indictment was the same identical offence with that charged in the indictment pleaded to.

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This being clearly the rule, there would not be much difficulty in applying it to an ordinary charge of felony; larceny, for instance, of the goods of A. B., or an ordinary charge of assault upon A. B. The prisoner charged on such an indictment would have to satisfy the Court, first, that the former indictment on which an acquittal took place, was sufficient in point of law, so that he was in jeopardy upon it; and secondly, that in that indictment the same offence was charged, for the indictment is in such a form as to apply equally to several different offences. To prove the identity of the offence may not always be easy. If more or less evidence is gone into on the first trial the difficulty is little; if none is offered and the acquittal takes place, it is still an acquittal, entitling the prisoner to an exemption from any subsequent trial for the same identical offence. In such a case there is more difficulty in showing what the offence charged was, but it may be proved by the testimony of witnesses, who were subpoenaed to go, and did go, before the grand jury, by the proof of what they swore, or perhaps by a grand jurymen himself, or by the evidence of the prosecutor, or by proof how the case was opened by the Counsel for him; in short, by any evidence which would show what crime was the subject of the inquiry, and would identify the charge, and limit and confine the generality of the indictment to a particular case. If the indictment were in a more precise form, and could be made to identify the offence charged on the face of the indictment itself, and distinguish it from all others, (as Scotch indict-

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ments I believe do), no such evidence would be required; but where the form is general, and may apply to a great variety of charges, parol evidence is necessarily admitted to show what the charge was; and if that evidence identifies the charge and shows what it was, its office is ended for this purpose; and whether the evidence given on the former trial was true or false, whether the jury believed or disbelieved it, and what inference it drew from it is immaterial, provided the prisoner was acquitted: the sole use of such evidence, on a plea of *autrefois acquit*, is to show what the charge in the indictment really was, and that being done, the effect of the indictment, in the general form, is just the same as if the offence were particularly described in it, in minute terms, to the exclusion of all others; and then the maxim *Nemo debet bis vexari pro eâdem causâ* applies.

No doubt the generality of the terms of the indictment leads to some inconvenience and difficulty, but it is compensated by the great advantage to the administration of justice from the greater latitude allowed to the evidence on the trial, which rarely, indeed never, operates to the prejudice of the prisoner, who generally knows the precise charges on his commitment.

Thus far is very clear, and there is little difficulty in applying this rule to all indictments at common law. If the former indictment had been, as the present is, for a certain number of assaults, and they were identical, an acquittal on that indictment would be a good bar to this. The only question would be, whether the assaults were identified by adequate evidence.

But all the difficulty in this case arises from the provision in the stat. 7 Will. IV. & 1 Vict. c. 85, s. 11, that on an indictment for a felony, the prisoner may be convicted of an assault, which is a departure from the clear and intelligible rules of the common law, and has produced no in-

considerable inconvenience, and, amongst the rest, the nice and difficult questions which have occurred.

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I think that a proper construction has been put upon it by the eleven Judges who decided the case of *R. v. Birch and another*, who were the same Judges who decided the following case in 1 Den. C. C. 187.

The Judges, proceeding to construe this statute, and ascertain what the species of assault contemplated by the 11th section was, found two classes of cases already decided. If they had held, that wherever the felony charged on the face of the indictment in its nature included an assault, as rape, homicide by violence, felonious cutting, the prisoner might be convicted of a common assault, wholly unconnected with any felony; the case in 2 Moo. C. C. 123, would have been wrongly decided. They held, therefore, that the indictment was not to be considered as an indictment for the offence of *an assault*, and *also* of a felony.

On the other hand, if the statute was to be considered as applying only to cases where the assault was committed with intent to commit the felony charged in the indictment—to inchoate felonies proved to be such—then all the cases in which parties had been convicted of assaults, where the charge was of felonious cutting, with intent to commit murder, or grievous bodily harm, would have been wrong, for the acquittal went on the ground that the prisoner did not intend to do either.

They therefore held, that the enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony, on the face of it charged an assault. But they were of opinion, that in order to convict of an assault, under this section, the assault must be included in the charge on the face of the indictment, and also be part of

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the very act or transaction, which the Crown prosecutes as a felony by the indictment. This construction having met with the concurrence of all the Judges, it ought to be abided by. In my judgment, it puts a correct interpretation on the words of the statute.

The case of *R. v. Phelps*, may perhaps be distinguished from this case on the ground already stated by my brothers Martin and Alderson. That was a charge of murder by a joint assault or assaults charged upon three persons, and evidence was given to prove it; and one could not be then properly convicted of a single assault at a different time, and totally unconnected with the transaction, which the Crown prosecuted as a murder. But whether distinguishable or not seems to me to be immaterial. If not distinguishable, I consider that *R. v. Birch*, which was decided afterwards upon full consideration of all the cases, and in order to settle the rule on the subject, must prevail.

But then on the construction of this, which clearly ought to be the rule, a difference of opinion exists among the Judges. As to that part of the rule which relates to the crime charged on *the face of the indictment*, including an assault against the person, there is no difficulty; it applies to felonious cutting, rape, felonious homicide by violence, all of which *in their nature* include a charge of assault against the prisoner, and the charge of murder in this case includes an assault, but it must also be part of the very *act or transaction* which the Crown prosecutes as a murder by the former indictment; and here lies the whole difference. The learned Commissioner thought that, to fall within the rule, it must *really have been*, and not merely have been *charged* to have been, contributory to the *death* of the deceased, which the Crown charged as a murder; and many of my brethren are of the same opinion: whereas, it seems to me, that it is enough to bring the assault within the meaning of this clause, if it is *charged* by the Crown to be part of the

very act or transaction which it charges as a felony, and it is made the subject of inquiry as such. There must be a *charge* of an assault as parcel of a felony, not necessarily an assault *actually* being a parcel of a felony: just as in the case of a charge of rape, an assault which the Crown charges as having been committed for the purpose of effecting it, though no rape has been committed—or a wounding charged to have been made with intent to kill and murder, when no such intent has been proved—may be punished on an indictment for either felony, though in one the assault could not contribute to the rape, or in the other to the felonious wounding, for there was neither one nor the other. These assaults form part of the charge of felony made by the Crown in all these cases; they are put in a course of trial as such, though they did not in truth contribute towards any felony, for no felony was committed.

Therefore, in all these cases, where the charge on the face of the indictment includes an assault, that assault which the Crown means to charge by the express allegation of an assault (for we have only to deal with an express allegation in this case) as part of the very act which it charges as a felony, is virtually charged; and as soon as the assault, which the Crown means so to charge, is identified, marked, and distinguished from all others by competent evidence, the case becomes exactly the same as if the indictment were expanded, and the assault completely described so as clearly to identify it. The prisoner is charged with it, and may be convicted of it on that indictment, if he is acquitted of the felony, (for it is only a conditional charge dependent on that fact,) and if he be acquitted he is acquitted altogether and for ever from the charge and every part of it, just as if he had been indicted and acquitted of the same assault alone, fully identified by time, place, and every other necessary circumstance to distinguish it from every other assault. The evidence to identify this

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assault may be any evidence of the same sort as I have above stated is admissible to prove the identity of any other charge, not evidence to prove the crime or any part of it *actually committed*, but to prove what the offence was which the Crown did charge.

Feeling quite satisfied that this reasoning is correct, it remains to apply it to the facts of the present case.

A question immediately occurs, whether the 11th section applies to indictments of felonies including a single assault only, or to felonies which include many assaults—a rape or murder may include more assaults than one, and I do not feel a doubt but that in such cases, where the evidence shows that many assaults were meant to be charged as connected with the imputed murder, or rape, or felony, the prisoner may be convicted of them.

Now it appears that in this case on the former trial, the Crown charged the defendants with certain assaults between certain days, which assaults it charged to be the causes of the death of the deceased, and gave evidence of them, and tried to prove that they were so. The charge in the former trial consisted therefore of these three propositions—that certain assaults were committed by the prisoners—that they were committed *malò animo*—and that they caused the death of the deceased. On the first charge they were put on their trial as well as the last, absolutely, not conditionally, viz., provided the assaults turned out to have conduced to the death: and if the assaults are identified to be the same as those charged in this indictment, the prisoners were charged with, and acquitted of the assaults now charged. Indeed, if the charge of assault was to be tried *only* in the event of the assaults appearing to the jury to have contributed to the death, I do not see how they could have been tried at all as assaults, and the prisoners convicted of them; for if they did contribute to the death, the very assault which is punishable as such

being a wrongful act, the offence was manslaughter at the least. It is quite clear, that the Legislature contemplated such an assault as may be involved in the charge of felony, and of which the prisoner could be convicted, though acquitted of the felony; and how that could be, in a charge of felonious homicide, if the assault actually conduced to the death, I cannot understand.

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This direction of the learned Commissioner seems to me, therefore, in any view of the case to be manifestly wrong, if the act applies to murder or manslaughter at all. A doubt has been suggested whether it does by my brother Erle; but the words of the statute are perfectly clear according to the ordinary rule of construction, and as they lead to no absurdity or incongruity in any view of the case, I think clearly they must be taken to include, as they expressly state, *every* felony.

If the Act does not include murder and manslaughter, the direction would be wrong; but the defendants would have been lawfully convicted of the assault in the present indictment, on the ground that charges of murder and manslaughter were to be dealt with at common law and not under the statute.

In this case the jury acquitted of the felony, for the blows it appeared did not cause the death of the deceased; but the charge of assault in my opinion remained, and the prisoners might have been convicted of those very assaults which are charged on the second indictment; and having been acquitted of the charge in that indictment, they were acquitted altogether.

And it would be contrary to the wise principle of our law, that a man should be subject to more than one trial for exactly the same offence.

POLLOCK, C. B.—The question in this case, as it has been

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already observed, turns upon the true construction of the stat. 7 Will. IV. & 1 Vict. c. 85, s. 11, by which, for the first time, it became lawful upon an indictment for felony, to convict of a misdemeanour; and we have to consider whether the prisoners could have been properly found guilty of an assault when, on the former occasion, they were tried and acquitted of the murder; for if they could have been so found guilty, they have once been in peril, and they are now entitled to our judgment on the plea of "*autrefois acquit*."

Under the circumstances presented for our consideration by the learned Commissioner of Oyer and Terminer, I am not surprised that there should be considerable difference of opinion among the assembled Judges; we are called upon to put a construction upon an Act, which, in very general terms, has introduced an anomaly in the administration of the criminal law. The distinction between felony and misdemeanour is as old as the law itself, and many important consequences follow from that distinction. Before the passing of the Prisoners' Counsel Bill, they were more important than they are now, but some important differences still remain. The statute has not abolished the distinction between felony and misdemeanour, (whether that would have rendered the case more clear, or whether that, when it came to be fully considered, would not have raised a greater difficulty than we have now to contend with, I shall not pause to inquire) but the statute has introduced, in terms very general, a power to acquit of felony, and to convict of assault only, where the crime charged shall include an assault, and the evidence will warrant such finding. The statute makes no specific provision for the present or any other particular case, as distinguished from the general class. It does not provide specially and separately for various very different cases that may be suggested; as, for

instance, where some felony has actually been committed by some one, but possibly not by the prisoner, or where it is left in doubt whether it was by the prisoner or not, or where it is clear that no felony has been committed, but an attempt has been made to commit one by the prisoner, or by a person not before the Court. Nor does the statute apparently make any distinction between the above cases, and a case where the whole charge of felony is founded in mistake, and there has really been no felony committed at all, or even attempted, and the charge of felony is founded altogether on error. I think it cannot be matter of surprise, when all these various cases may arise, and the statute consists, as regards this part of it, of a few general words only applicable to all, that much doubt may arise as to their meaning, when it is necessary to apply the same words to cases differing so much from each other.

Here we have to inquire, in the construction of this part of the Act, what was in this case "the crime charged," and did it include the assaults in question? If it did, the prisoners have already been acquitted, and cannot be tried again. If it did not, the former acquittal is of no avail, and the present conviction is right.

I think the meaning of the words "crime charged," must be sought for in the old forms under which the jury were addressed by the officer of the Court. "Your charge, therefore, is to inquire whether the prisoners be guilty or not of the felonies," and, according to the new practice introduced by this Act, the charge to the jury would be to inquire whether the prisoners were guilty or not guilty of the felony and assault, and the question again returns, what would be the assault thus alluded to? It appears to me, that in a case where a felony (of whatever sort) has been actually committed, the charge is the felony committed, and the means whereby it was committed; and I entirely agree with the doctrine laid down by my brother

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Parke, in the case of *R. v. St. George (a)*, that the prisoners can only be found guilty, under this Act of Parliament, of an assault involved in and connected with the principal charge of felony. This cannot, I think, depend upon the mistake or blunder of the prosecutor, or of his Counsel, or of any of the witnesses; it depends upon the truth itself, as it may come out in evidence and be found by the jury.

It seems to me contrary to first principles, in administering the criminal law, and in construing this Act of Parliament, that an accused party who may have been guilty of a common assault, and a common assault only, never intending to commit a felony or even contemplating it, should be liable to three years' imprisonment, and, according to some constructions of the Act, to hard labour during that time, because some blundering clerk of assize has drawn an indictment, or some rash prosecutor has made an accusation, or some mistaken or incredible witness has associated, by the indictment, by the accusation, or by the evidence, this simple assault with a felony, be it murder or other, with which felony in truth and in fact it had no connection whatever.

In this case the charge was the murder of Mary Ann Parsons. It appears that she came to her death by a single blow, which could not by the evidence be imputed to either of the defendants. The guilt of both might be suspected with reference even to that fatal blow; but the guilt of neither was proved, and therefore, very properly, both were acquitted. That very acquittal on that ground, in my judgment, dissociated all other assaults that did not tend to the death from the crime charged, and the crime charged did not include those assaults, and I think it was not lawful for the jury to convict of those assaults. It would follow

(a) 9 Car. & P. 491.

from this, that they were properly convicted of assault in the case now before us.

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I must admit the construction of the Act as to this matter is by no means free from great doubt: the difference of opinion of the assembled Judges sufficiently attests this. Many cases of difficulty may be presented either way, and I must freely confess that I doubt whether any construction of the statute would afford a satisfactory solution of all the difficulties that might arise in the various cases that might be suggested. During the course of the two arguments, and the deliberations that have ensued, I have found it difficult to come to a conclusion which I felt to be perfectly satisfactory; but comparing the difficulties on the one side and on the other, I have at length felt it my duty to pronounce the judgment I have already expressed; and while I disclaim any argument or view of any sort founded on this particular case itself, I own I have been fortified by this consideration, that this statute is manifestly a departure from the common law: as far as its enactments are clear we are bound to obey and to enforce them; but when they become doubtful (and who shall say that this is not so?) it is safe, and I think it our duty, to stand by the common law.

JERVIS, C. J.—I am of opinion that the conviction in this case was wrong.

The question turns upon the true construction of the statute 7 Will. IV. & 1 Vict. c. 85, s. 11, which in *Birch's case* (a), was considered by eleven Judges, who consulted all the authorities and professed to expound the Act with a precision which could not mislead.

That case was principally relied upon in argument by

(a) 1 Den. C. C. 185.

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the defendant's Counsel, and ought to be a ruling authority upon the subject; but unfortunately some question the correctness of the rule which is there laid down, whilst others, adopting it, arrive at a conclusion altogether different from that which was intended by the framers of the rule. We cannot therefore take that case as conclusive upon the present occasion, and inasmuch as a reference to all the authorities has produced this most unsatisfactory result, I must, unaided by authority, endeavour to put a construction upon the statute itself.

I take it for granted that in all cases where the Act applies and the evidence warrants such finding, the jury must find the prisoner guilty of assault. It is not left to their option to convict of assault or to acquit the prisoner altogether, and leave him for further prosecution in the form best suited to the justice of the case. The Act is compulsory, and the prisoner is in jeopardy in all cases to which the Act applies. Numerous inconveniences might be pointed out as the certain result of this admitted construction.

The statute only applies to an indictment for felony where the crime charged includes an assault. It is absolutely necessary that the crime charged should legally include an assault. Crimes of this nature are murder by violence, rape, robbery, stabbing and the like. You cannot bring the case within the Act by averring in the indictment an assault as accompanying a crime which legally does not include an assault. Nor on the other hand is it necessary, in order to found the jurisdiction of the jury, to state an assault in an indictment for a crime which legally includes an assault. It is prudent to do so, but it is not in strictness necessary; for, where the crime charged includes an assault by implication, the charge of assault appears upon the indictment, and thus the rule is satisfied which requires

that when the record is made up, the charge should appear upon which the prisoner is found guilty and subsequently punished.

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But, although the crime charged does legally include an assault, it does not follow that the Act may be called into operation. The jury have but a conditional power to find the prisoners guilty of the assault : they must first acquit him of the felony. The trial therefore throughout is a trial for felony to be governed by the rules which regulate such trials ; and if one assault only be laid in the indictment as the cause of the death by violence, or if the crime charged in its nature legally, or in fact, include but one assault, one assault only can be produced in evidence as tending to prove the crime charged ; and the prosecutor having made his election, and proved an assault, cannot abandon that and produce evidence of another assault having no relevancy to the proof of the crime charged, but committed upon another occasion. So if several assaults are laid in the indictment as causing the death, or if the crime charged legally may and in fact does include several assaults, the same rule will prevail, subject to the same qualifications, for the trial is proceeding for felony, the evidence produced is produced to prove the felony and is to be controlled by the rules which are applicable to trials for felony. When the whole evidence is closed, and before they can find him guilty of assault, the jury must acquit the prisoner of the felony. Upon what ground is that acquittal to take place ? Surely because the evidence warrants such acquittal. The prisoners could not be guilty of the felony if there was no felony, or if the felony was committed by another person.

But the evidence which was brought to prove the felony, and which was insufficient for that purpose, may prove beyond doubt that the prisoner was guilty of assault. The crime charged includes an assault. The jury have ac-

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quitted the prisoners of the felony. The evidence warrants a finding of assault; what are the jury to do? The Act is admitted to be compulsory. They shall "find a verdict of guilty of assault against the person indicted."

Thus reading the statute full effect is given to the plain common-sense meaning of every word used. I have not sought for the object of the enactment, for where there is no ambiguity no foreign aid is necessary to expound an Act, and it is dangerous to speculate upon the motives of those who may pass measures through Parliament, particularly if the plain meaning of words is to be disregarded for the purpose of effectuating that supposed intention.

It is contended that the assault of which alone the jury can convict the prisoner is that included in the crime charged, and that consequently if the crime charged be committed by another, the prisoner cannot be guilty of the assault. This restriction is not in my opinion justified by the letter of the Act, but seems to me to have been intentionally excluded from it. The jury are not to find the prisoner guilty "of the assault so included in the crime charged," nor "of the said assault," nor "of such assault," nor even "of an assault," but of "assault." If the prisoner cannot be convicted of assault where the crime charged was committed by another, because in that case the assault by the prisoner cannot be included in the crime charged; it would seem to follow that where the crime charged did not in fact exist, it would not include an assault by the prisoner. In the latter case, however, it is admitted that the prisoner might be convicted of the assault. But it is said that every felony within this Act consists of an assault and something more, which makes a felony, and that if a third party is guilty of the whole felony, including the assault, the whole charge is exhausted, and the prisoner cannot be guilty of the assault. This construction gives a

meaning to the words of the statute which I think they do not bear; but, independently of that, it makes the jeopardy of the prisoner for the assault to depend upon the guilt or innocence of a third party, which must be determined in his absence by a jury who are not sworn to try that fact.

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In strictness, indeed, there was in this case no proof that homicide had been committed by any one. The death was caused by a blow inflicted on the child's head, whether by the prisoners or by other persons, under what circumstances, or as the mere result of a fall, was not proved and could not legally be determined by the jury; they could only acquit the prisoners of the felony: having done so, their functions in so far as the felony was concerned, were at an end; they could not inquire by whom the felony was committed, or if a felony was committed at all.

The soundness of the distinction contended for may be tested by the actual circumstances of this particular case. If it had been proved that the child had not died, it is admitted that the prisoners might have been convicted of assault upon this indictment for murder. If the death resulted from natural causes, it is admitted the prisoners might have been convicted of assault upon this indictment for murder. If it was homicide by another, it is said the prisoners could not have been convicted of assault upon this indictment for murder. But it is only homicide if the blow was inflicted by the act of another person; if it was the result of a fall, for this purpose, the death was natural. Thus the liability of the prisoners to be convicted of an assault is made to depend on a matter which the jury cannot legally settle: they can say that the prisoners are not guilty of the felony, but whether the death was felonious, justifiable, accidental, or natural they cannot legally determine.

For these reasons I am of opinion that upon the true

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construction of this statute a prisoner may be acquitted of the felony, and be convicted of assault upon an indictment for felony wherever the crime charged legally includes an assault, and the evidence properly admissible and produced to prove the crime charged warrants the finding of assault; and that such liability to conviction for assault does not depend upon the ground of the acquittal for felony, but will equally exist whether the felony was disproved, or was shown to have been committed by a third party.

It follows from this opinion, that in my judgment the proper question was not left to the jury by the learned Commissioner upon this plea of *autrefois acquit*. Upon such a plea three questions arise: the first is a question of law: Is the crime charged upon the first indictment a crime of the class which includes an assault? If it is, then arises the second question of fact, What assault or assaults was or were in fact included in the first indictment? The affirmative of this lies upon the prisoner, and from the generality of our criminal pleading, more especially in cases under the statute where the assaults may appear upon the indictment by implication only, may be attended with much practical difficulty. If our indictments had been in the Scotch form, with a condensation of the various assaults consummated by the felony, the task would have been easy; the mere production of the record with the acquittal of the felony would leave the charges of assault upon which the prisoners would have been in jeopardy upon the first trial clearly defined. In the absence of such assistance the prisoner must resort to the best evidence in his power. If the first case was tried out he may prove what occurred upon that trial—the opening of Counsel, the examination of witnesses—and thus show what assaults were brought forward and were legally admissible upon that indictment as tending to prove the crime charged. If an acquittal was

taken without evidence he may for the same purpose perhaps prove what occurred before the grand jury when the bill was found, for such evidence is not within the oath of the grand jury—"the Queen's Counsel and their own"—or he may resort to the depositions, or the instructions upon which the bill was framed. It is not necessary however now to enlarge further upon this subject; the same difficulty arises in a greater or less degree upon all pleas of *autrefois acquit* and *autrefois convict*, and the evidence upon such pleas in all cases must be governed by the same rules.

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Having designated or earmarked the assaults included in the first indictment, the third question, likewise a question of fact, occurs: are the assaults so designated the identical assaults which the prosecutor professes to produce on the second trial? This likewise must be proved by the prisoner; but, if it is established, then the identity of the charge being made out, the prisoner was before in jeopardy upon the same charge, and is entitled to judgment upon the plea of *autrefois acquit*.

For these reasons I am of opinion that the proper question was not put to the jury; that the conviction was wrong; and that the prisoners were entitled to judgment upon the plea of *autrefois acquit*.

LORD CAMPBELL, C. J.—After long and anxious deliberation, I have come to the conclusion that in this case the former acquittal is a bar to the present prosecution. I should feel deep regret if great offenders were to escape punishment, but the due administration of criminal justice requires that the forms of judicial procedure should be observed. These forms are devised for the detection of guilt, and for the protection of innocence. In the present instance the defence does not rest upon a mere technicality,

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but upon the sacred maxim that “no one ought to be twice tried for the same cause.” The only question is whether the defendants might under the former indictment have been lawfully convicted of the assaults for which they are now prosecuted; and it is the same question which we should have had to consider if they had been convicted of these assaults, and the validity of that conviction had been referred to this Court. A majority of the Judges appear to think that the general acquittal was proper, but I am humbly of opinion that the second trial was unnecessary and unlawful.

The case entirely depends upon the construction of the stat. 7 Will. IV. & 1 Vict. c. 85, s. 11. Let us first consider the mischief which this enactment was intended to remedy. At common law, a person indicted for a felony which involved an assault must have been wholly acquitted, although proved to have committed the assault charged in the indictment and given in evidence by the Crown as the means of committing the felony, if his attempt to commit the felony was not fully accomplished, or if a felony had been committed to which the assault did not conduce, or if no felony had been committed or attempted. This was found to be extremely inconvenient, for the prisoner, proved to have committed a grave offence of which he was accused, either got off with perfect impunity, or a new indictment was preferred against him for the same assault, and the same evidence was again given against him before another jury. In the former event public scandal was given by a failure of justice, and in the latter the accused party was unnecessarily harassed, and unnecessary expense and trouble were occasioned by a second trial. I conceive that the object of the statute was to permit—in spite of the technical rule of the common law, which forbids, under an indictment for felony, a conviction for an offence amounting only to a mis-

demeanour—that wherever there is an indictment for a felony involving an assault, the prisoner may be convicted of the assault charged in the indictment and given in evidence as conducive to the felony, although he be acquitted of the felony, and whether the assault was, or was not, in point of fact, conducive to the felony.

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This surely would be a very reasonable law, both for the sake of the public and of the prisoner. To my mind it is enacted by the following words, “on the trial of any person for any felony where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such a finding.”

Soon after the Act passed a construction of it was contended for confining its operation to cases in which the assault was committed in an attempt to commit the felony charged. For this construction plausible reasons were urged, but it was—I think very properly—overruled by several solemn decisions of the Judges.

Thus, the quality of the assault, that it shall actually be conducive to the felony, is gone; and I can conceive no other intelligible rule to go by, than that the assault shall be charged and shall be given in evidence as conducive to the felony. With these conditions, the party accused has ample notice of the offence which he has to answer, and an ample opportunity of vindicating his innocence. The statute certainly did not mean to give the prosecutor the advantage of adding to the indictment a count for an assault unconnected with the felony; but the rule I would lay down admits of no such perversion. The assault must be an assault against the person, and included in the crime charged; if it be, then it shall be lawful for the jury to acquit of the felony, and to find a verdict of

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guilty of assault, should the evidence warrant such finding. I know not why a proviso is to be introduced that the statute shall not apply where evidence is subsequently given that the assault charged and proved as conducing to the felony did not conduce to it. In the present case the assaults which are the subject of the second indictment for misdemeanour were expressly charged in the second and third counts of the indictment for murder, and they were actually given in evidence at the former trial with the express purpose of proving the felony alleged in those counts. Moreover, when they were given in evidence they were material and powerful proof that the crime of murder had been committed by the prisoners. Subsequently, a medical witness of skill and credit swore that the death was caused exclusively by a blow on the head of the deceased, not shown to have been inflicted by either of the prisoners. Thereupon my brother Talfourd most properly interposed, and advised the jury to acquit them of the murder; but, with the most sincere deference for his opinion, and that of my learned brethren who agree with him, I think he ought to have directed the jury, that if they believed the medical witness and acquitted the prisoners of the murder, they must direct their attention to the uncontradicted evidence proving the assaults, and find a verdict of guilty upon the portions of the indictment charging those assaults, should they think "that the evidence warranted such finding;" that is to say, if they believed the uncontradicted and unsuspected witnesses for the Crown who swore to those assaults. Being once connected with the felony, and sufficient to prove it if the death were not imputed to another cause, I do not understand when or how they were disconnected from it, and became independent and distinct assaults. Juries, in practice, defer to the opinion of the Judge upon such an occasion, and a formal summing up

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becomes unnecessary; but if there be any evidence to go to the jury from which they might draw an inference of guilt in strict law, it is supposed to be submitted to them. The assaults proved against the prisoners were connected with the felony till the verdict of not guilty was pronounced. But it is before the verdict is pronounced, as I conceive, that the Judge is to tell the jury that if they acquit of felony they may convict of assault; it is not by the verdict of "not guilty of the felony" that the Judge is prevented from drawing the attention of the jury to the minor offence. The statute clearly supposes the direction to be given to the jury that if they acquit of the felony they may find a verdict of guilty of assault, the evidence warranting such finding.

In this case, morally speaking, the jury would not have been justified in disbelieving the medical evidence, and concluding that the assaults, of which the prisoners were proved to have been guilty, caused the death. But cases may easily be imagined in which the jury would be justified in disbelieving medical evidence, and, in spite of it, properly finding a verdict of guilty of the murder. How then are we to lay down a rule—that assaults once connected with the felony are to be disconnected from it by a medical opinion that they did not conduce to the death? It was hardly contended at the bar that the prisoners might not have been convicted of the assaults if it had turned out to be a case in which no felony appeared to be committed. And I cannot understand how the case is less within the statute because the evidence led to the belief that a murder had been perpetrated in which the prisoners were not implicated.

A good deal of stress was laid upon the power given by the 8th section of 7 Will. IV. & 1 Vict. c. 85, to sentence any person found guilty of the offence within the Act to hard labour and solitary confinement. But this argument was exhausted when the Judges determined that the enact-

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ment about convicting of assaults was not limited to assaults in an attempt to commit a felony. The power of punishing by hard labour and solitary confinement is only discretionary, and the Legislature probably thought that it might often be usefully exercised if the assault was connected with the commission of a felony, although proof had not been given that the felony was attempted. In the present case had there been a conviction for the assault at the first trial simple imprisonment might have been generally considered an inadequate punishment for the delinquency established.

I do not think it necessary to refer to the various decisions which have been commented upon by my learned brothers who have preceded me. I will content myself with observing that the most recent of these, *R. v. Birch*, seems to me to be an express authority for this construction of the statute. There no felony had been consummated, and the jury expressly found that the assault had not been committed with an intent to rob. Yet the Judges unanimously held that the prisoner had been properly found guilty of the assault. Could it have made any difference in that case if there had been additional evidence that after Birch (the prisoner) struck the prosecutor, a stranger was seen to give him an additional blow, to take his purse, and then to escape?

I must beg the particular notice of my brethren to the replication to the plea of *autrefois acquit* on which the issue is joined,—“that the prisoners were not acquitted of the felony and murder, including the same identical assaults charged in the present indictment.” The case submitted to us expressly states that the assaults for which the second indictment was preferred were given in evidence at the former trial, that “the Counsel for the prosecution in opening the case to the jury on the former trial had opened these different assaults as con-

ducive to the death;" and that "it was not shown on the second trial that there were any other assaults committed but those which were given in evidence on the former trial." I am bound to say that upon this statement the prisoners were acquitted of the same identical assaults charged in the present indictment, and are therefore entitled to our judgment.

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I need only very briefly advert to the argument urged by the Counsel for the prosecution, that even upon the supposition that the prisoners might have been convicted of the assaults under the first indictment, yet as the Judge did not submit this question to the jury the general acquittal does not entitle them to plead *autrefois acquit* in bar of the indictment for misdemeanour; but if they might lawfully have been convicted of the assault at the first trial they were then in hazard, and they are not again to be put in hazard of being convicted of the same charge. There would be no safety for mankind if the benefit of a former acquittal might be done away with by inquiring into the terms in which the Judge summed up at the former trial, although the indictment and the evidence then given sought to convict the prisoner of the same offence for which he is again prosecuted, and if he were guilty of it there was an opportunity of establishing his guilt. It is only the ignorant and the presumptuous who would propose that a man should be liable to be again accused after a judgment regularly given pronouncing him to be innocent. According to this novel doctrine, the Crown might a second time prosecute for high treason a person who had been acquitted of the charge by a jury of his country, and there would be no end to prosecutions for felony or misdemeanour prompted by private malevolence.

I have only further to observe that I think the direction of the learned Judge at the last trial was exceptionable, and I

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hardly see how the conviction under it can be approved by any who are not of opinion that there can only be a conviction of assault under 7 Will. IV. & 1 Vict. c. 85, where the assault was in an attempt to commit the felony. He told the jury that if they were satisfied that there were several distinct and independent assaults, some or one of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the Crown. I am of opinion that he should only have directed the jury to find for the Crown if there were any assault in evidence which was not included in the former indictment, and not offered in evidence at the former trial as part of the transaction so that it might be considered an independent and distinct assault unconnected with the felony. As he directed the jury, they were bound to convict if there was any assault in evidence which did not in fact conduce to the death of the deceased, however it might have been connected with the felony, and indeed with whatever intent it might have been inflicted. The result of the evidence at the first trial is supposed to be, that the death was caused exclusively by a blow subsequently given, which was not the subject of the second indictment. Upon this supposition no prior assault could have conduced to the death. Therefore the jury at the last trial were obliged to find a verdict of "guilty," as none of the assaults proved did conduce to the death, although they were all offered in evidence as conducing to the death and were substantial evidence to prove the murder. This seems to me not only to differ from my construction of the statute, but to put a narrower construction upon it than it has at any time received, since the decisions that the assault need not be committed in an attempt to commit the felony.

For these reasons I think that the conviction ought to be quashed ; but a majority of the Court being of a contrary

opinion, the conviction is affirmed, and the judgment which was respited will be pronounced upon the defendants at the next assizes for the county of Devon.

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I hope I may without impropriety express a wish that the Legislature will speedily repeal or explain the enactment which has caused such confusion. Of course I am ready to abandon the construction of it for which I have been contending, and most respectfully and submissively to be governed by the opinion of my learned brethren who differ from me ; but I have not been able to gather from them any clear and certain rule for my future guidance, and I am afraid that without the interference of Parliament, notwithstanding our best efforts to be unanimous, we ourselves, as well as others, may again find it difficult to anticipate the result of our deliberations.



EASTER TERM,

IN

THE FOURTEENTH YEAR OF THE REIGN OF VICTORIA.

CORAM

LORD CAMPBELL, C. J.

COLERIDGE, J.

ALDERSON, B.

PLATT, B.

TALFOURD, J.

THE QUEEN *against* WILLIAM DAVIS.

1851.

Saturday,
April 26.

IDEM SONANS.

“UPON the trial, for a felony, of William Davis at the Quarter Sessions held at Dorchester, for the county of Dorset, on the 31st day of December, 1850, it appeared that the property alleged to be stolen was stated in both counts of the indictment to be the property of Darius Christopher. A person of the name of Christopher, the prosecutor of the charge, was called as a witness, and on being asked what was his christian name said it was ‘Trius.’ It was then objected by the prisoner’s Counsel that the property had been laid in the wrong person. It was answered that the rule of law as to *idem sonans* was applicable, and that Trius and Darius when pronounced sounded as the same words, and of this opinion was the Court, and overruled the objection. The trial then proceeded, and the prisoner was found guilty on the second count. The Court did not pass sentence, but reserved the question above mooted for the opinion of the Justices of either Bench, and the Barons of the Exchequer. The prisoner

A prisoner was indicted for receiving, &c., the goods of *Darius C.* The prosecutor said in evidence that his name was *Trius C.* Held, that the question of *idem sonans* was for the jury.

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was discharged on recognizance of bail to appear and receive judgment at the next Quarter Sessions in April.

“The question for the Court is,—are the words ‘Trius,’ and ‘Darius’ pronounced so as to produce the same sound. If so, the conviction is to stand. If not, the prisoner is to be entitled to an acquittal.

“GEORGE PICKARD CAMBRIDGE,

“Chairman.”

The case was sent back to the Chairman of the Quarter Sessions for him to state whether it was left to the jury to decide “if the two names sound alike so as to designate the prosecutor and no one else, thereby distinguishing him from all others.”

The Chairman returned, “That on his laying down the rule as to names being *idem sonantia*, and the Court being of opinion that the names Darius (pronounced in the Dorsetshire dialect D’rius) and Trius sounded alike, the case proceeded without its being either expressly or substantially left to the jury to decide as to the question of the names sounding alike, but the jury found their verdict upon the facts of the case, and the motion of Counsel was in arrest of judgment.”

No Counsel appeared on either side.

LORD CAMPBELL, C. J.—*We* cannot, in point of law, say that Darius and Trius are the same in sound. It was a question for the jury. Sometimes names may be spelt differently and yet pronounced the same, but in others a slight difference in the manner in which the name is written, may be fatal, as in the case of Shakespeare and Shakepeare, because the S is always sounded. The conviction must be quashed.

ALDERSON, B., COLERIDGE, J., PLATT, B., and TALFOURD, J., concurred; COLERIDGE, J., observing that a west-country jury would have found the names were the same in sound.

Conviction quashed.

THE QUEEN *against* JOHN POYSER.*Case reserved by the Honourable Baron Alderson.*

1851.

*Saturday,
April 26.*

LARCENY.

“THE prisoner was tried before me, for larceny, at the last Assizes for the county of Leicester. It appeared at the trial that the prisoner was employed by the prosecutor, who was a tailor, to sell clothes for him about the country, and upon the following terms:—The prosecutor fixed the price of each article, and the prisoner was entrusted to sell them at that fixed price, and when he had done so was to bring back the money and the remainder of the clothes unsold, and was to have 3s. in the pound on the moneys received, for his trouble. On the 12th of February last, he took away a parcel of clothes upon these terms, and instead of disposing of them according to the above arrangement, he fraudulently pawned a portion of them for his own benefit, and having so done, he afterwards fraudulently appropriated the residue to his own use. These facts having appeared, I directed the jury that the original bailment of the goods by the prosecutor to the prisoner was determined by this unlawful act in pawning part of them, and that the subsequent fraudulent appropriation by the prisoner of the residue of the goods to his own use, would, in point of law, amount to a larceny. Upon this direction the prisoner was found guilty, and I desire the opinion of the Judges upon the point, whether this direction was right.

“E. M. ALDERSON.”

O'Brien for the prisoner.—[*Alderson*, B.—Is not this like the case of a carrier?] There is this distinction;—the carrier receives the goods in bulk, to be delivered in the

The prisoner received various articles of clothing from his employer to sell about the country; to each article was affixed a separate price. The prisoner was to receive a commission upon the goods he sold, and to return the remainder. The prisoner fraudulently pawned some, and appropriated the rest to his own use. Held, that he was properly convicted of larceny.

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same state as that in which he receives them ; he has no authority to separate them ; the prisoner received the goods separately, made them himself into one parcel, and was to dispose of them, each article separately, or otherwise, as he might find persons to purchase. It was immaterial that he received them all at the same time from the prosecutor. Each article had a separate price attached to it, and the prisoner had the lawful possession of each to sell at that price. It was quite clear the prisoner himself might have become the purchaser, and that for the purpose of disposing of any of the articles, he might at any time break the bulk. He submitted that there was a separate bailment in respect of each of the articles ; that, unless it were so, the prisoner could not have disposed of any portion of them separately. [*Lord Campbell, C. J.*—There would have been nothing wrong in his separating them in the course of his duty.] *Reg. v. Stear (a), Reg. v. Hey (b).* [*Alderson, B.*—Your case is that of a carrier having half-a-dozen parcels, and disposing of one of them.]

No Counsel appeared for the Crown.

LORD CAMPBELL, C. J.—I am of opinion the conviction is right. If it could have been made out that each article was a separate bailment, the argument for the prisoner would have been correct. But when I read the case, the only inference I can draw is, that there was but one bailment, although it was composed of different articles. If that be so, any tortious act determines it ; and if done *animo furandi* it is larceny.

ALDERSON, B., COLERIDGE, J., PLATT, B., TALFOURD, J., concurred.

Conviction affirmed.

(a) 1 Den. C. C. 349 ; *ante*, p. 11.

(b) 1 Den. C. C. 602 ; *ante*, p. 209.

THE QUEEN *against* WILLIAM POTTER.*Case reserved by the Honourable Justice Cresswell.*

1851.

*Saturday,
April 26.*

COUNTING-HOUSE.

“THE prisoner was indicted for breaking and entering the counting-house of David Gamble, at the parish of Prescott, and stealing therein 500 pennies, &c., the moneys of the said David Gamble.

“It appeared in evidence, on the trial before me at Liverpool, that David Gamble was proprietor of extensive chemical works at Prescott, and that the prisoner broke and entered a building, part of the premises of David Gamble which was commonly called the machine-house, and stole therein a large quantity of copper money. In this building there was a weighing machine, at which all goods sent out were weighed, and one of Gamble’s servants kept in that building a book, in which he entered all goods weighed and sent out. The account of the time of the men employed in different departments was taken in that building, and their wages were paid there. The books in which their time was entered were brought to that building for the purpose of making the entries and paying the wages. At other times they were kept in another building called the office, where the general books and accounts of the concern were kept. It was objected for the prisoner, that the building broken and entered by him was not properly described as a counting-house. The jury found the prisoner guilty, and I abstained from passing any sentence, wishing to have the opinion of this Court on the question, whether the prisoner can be punished for breaking and entering a counting-house, and stealing therein, or for simple larceny only. In the mean time he remains in custody.

A building, part of the premises of a factory, was called the “Machine-house.” In this place all goods sent out were weighed and entered in a book kept there. Other books, usually kept in another building called the “Office,” were used there for the purpose of taking the men’s time and paying them their wages. Held that this was a counting-house within the meaning of statute 7 & 8 Geo. IV. c. 29, s. 15.

“C. CRESSWELL.”

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No Counsel appeared on either side.

LORD CAMPBELL, C. J.—We have looked to this case, and think the conviction right. There was abundant evidence to show that this was a counting-house within the meaning of the statute 7 & 8 Geo. IV. c. 29, s. 15.

ALDERSON, B., COLERIDGE, J., PLATT, B., TALFOURD, J., concurred.

Conviction affirmed.

THE QUEEN *against* HALLETT.*Case reserved by the Honourable Justice Talfourd.*

1851.

*Saturday,
April 26.*

PERJURY.

“THE prisoner was indicted at the last Gloucester Assizes for perjury committed before an arbitrator, on an arbitration directed by order of the judge of a County Court and assent of the parties pursuant to the 77th section of 9 & 10 Vict. c. 95. The oath was administered in the usual form by the arbitrator appointed.

An arbitrator appointed under the County Court Act has no power to administer an oath. False swearing before such a person is not perjury.

It was objected for the prisoner (a) that the arbitrator had no power either under the County Court Act or otherwise to administer the oath, and that neither by that Act or otherwise was a party sworn and giving evidence at such arbitration made liable to the pains of perjury.

“The prisoner was found Guilty. I respited the judgment, and reserved the point for the opinion of the Court of Criminal Appeal.

“The question for the opinion of the Court is whether an indictment for perjury will lie in respect of an oath so taken and evidence so given.

“T. N. TALFOURD.”

Skinner, for the prisoner. In *Watson on Awards* (b), it is laid down that “in cases where the submission to arbitration is by agreement, and does not contain a provision that it may be made a rule of Court, the law remains as it was before the statute, viz., that the arbitrator has no power to administer an oath to the witnesses to be examined before

(a) The prisoner was defendant in the cause referred to arbitration. Upon the application of Mr. *Skinner* to have that fact added to the case, the Court took the case as if the words “party in the cause” had been inserted.

(b) 3rd edit. p. 125.

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him." The statute referred to is the 3 & 4 Will. IV. c. 42, s. 41, by which it is provided "that when in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of Court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator or umpire, or any one arbitrator, and he or they are hereby authorized and required to administer an oath to such witnesses, or to take their affirmation in cases when affirmation is allowed by law instead of oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly." This is the only authority of an arbitrator to administer an oath, and the statute would seem to be restrained to proceedings in the superior courts at Westminster. It applies only in those cases in which the rule or order of reference is made a rule of Court. It could not have any application to the County Courts which were not in existence at the time, nor even contemplated. The statute which regulates the proceedings of those Courts on this subject, the 9 & 10 Vict. c. 95, s. 69, limits the power, to administer the oath, to the Judge. The 77th section, that under which the arbitrator is appointed, does not confer any power for that purpose; and the 83rd section expressly provides that in any proceeding under the Act where the parties are to be examined the oath shall be administered by the proper officer of the Court. In sect. 84, the crime of perjury in the County Courts is specially defined. "Every person who in any examination upon oath or solemn affirmation before any Judge of the County Court, shall wilfully and corruptly give false evidence, shall be deemed guilty of perjury." Therefore, in order to render

a party guilty of perjury, the statute not only requires that the oath should be administered by the proper officer of the Court, but also that the false evidence should be given before the Judge himself. Upon an examination before the grand jury the oath is always administered before the Judge of the Court. To constitute the crime of perjury it is not sufficient that the party swear falsely in a proceeding; it must be where the party administering the oath has authority at common law to do so, or where he has an authority *expressly* provided by statute.

M^r Mahon, for the Crown. It was not material that the party convicted was himself a party to the cause. [*Lord Campbell*, C. J.—No, nothing turns upon that (a).] In Haw. P. C. (b) it is said “that all such false oaths as are taken before those who are in any ways intrusted with the administration of public justice in relation to any matter before them, in debate, are properly perjuries.”] [*Lord Campbell*, C. J.—There is no instance of an arbitrator having taken upon himself to administer an oath before the statute (c). In Burn’s Just. (d) it is said that where a party has power to hear and determine a cause it is an incident to that power that he has the authority to examine upon oath. Here the arbitrator having an authority under the statute to hear and determine, has necessarily the power to do all that is requisite to arrive at a just determination. He also referred to a paragraph in Burn’s Just. “Oaths,” s. 1, on the stat. 1 & 2 Phil. & M. c. 13, and 2 Vin. Abr. “Oath,” A. 5, 6.

LORD CAMPBELL, C. J.—This is a case of considerable importance, and it is a very fit case to be brought before this Court to be determined. But I entertain no doubt whatever upon the question. The 77th sect. of the County

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(a) See 1 Haw., P. C., bk. 1, c. 27, s. 5.

(b) Bk. 1, c. 27, s. 3.

(c) 3 & 4 Will. IV. c. 42, s. 41.

(d) “Oath,” s. 1.

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Courts Act (*a*), gives authority to the County Court Judge, with the consent of both parties to refer certain matters to arbitration, and to appoint an arbitrator under the authority of the Court; but it says nothing as to any power on the part of the arbitrator to administer an oath, and I think he has not such power. It was the universal understanding in reference to the superior Courts before the statute 3 & 4 Will. IV. c. 42, s. 41, that although a person had authority to examine he had no authority to administer an oath. That statute first gave the authority, and declared that every person swearing falsely before the arbitrator should be guilty of perjury. But there is no such power upon a reference from a County Court any more than an arbitrator had power under a rule of Court before the stat. 3 & 4 Will. IV. c. 42, s. 41. False swearing, therefore, before such a person is not perjury. The judgment of Lord Holt (*b*) which has been referred to must be taken to apply to cases where the parties are proceeding judicially according to the common law. It cannot have any reference to the common-law proceedings of an arbitrator.

ALDERSON, B., COLERIDGE, J., PLATT, B., and TALFOURD, J., concurred.

Conviction quashed.

(*a*) 9 & 10 Vict. c. 95.

(*b*) In Vin. Abr., "Oath," s. 6, from 12 Mod. 393; See also, 1 Lord Raym. 472, S. C.

THE QUEEN *against* MARY ANN BENNETT.*Case reserved by the Honourable Justice Talfourd.*

PERJURY.

“MARY ANN BENNETT was tried before me, at the last assizes for the county of Gloucester, on an indictment charging her with wilful and corrupt perjury committed on the trial, at the Gloucester Spring Assizes, 1850, of Shadrach Lewis and Isaac Hopkins for a rape upon herself.

“The indictment against Mary Ann Bennett, after stating the trial and the oath taken by the prisoner as a witness in the usual form, proceeded thus to allege the materiality of the matters assigned as perjury and the prisoner’s evidence, which the assignments were applicable :—

“That, upon the trial of the said indictment, the following questions became and were material, and each of them respectively became and was a material question ; whether : not the said Mary Ann Bennett ever got one Milo Williams, to write a letter for her, and whether or not she the said Mary Ann Bennett saw the said Milo Williams ; the house of the father of the said prisoner Shadrach Lewis, when the said letter was written, and whether : not she ever saw the said Milo Williams at the house of the said father of the prisoner Shadrach Lewis, and whether : not she ever saw the said Milo Williams in any house, and whether or not she ever saw the said Milo Williams more than once, and whether or not the said Shadrach Lewis and the said Isaac Hopkins, or either of them, violently, feloniously, and against the will of the said Mary Ann Bennett, ravished her.

“That said Mary Ann Bennett being so sworn, &c.,

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The prisoner was indicted for perjury. The indictment alleged that, upon a previous trial, in which the prisoner was a witness, she was asked (and it was a material question) whether she ever got one Milo Williams to write a letter for her ; that she swore that she never got a Mr. Milo Williams (pointed out to her in Court, and who was proved to have written the letter) to write a letter for her. The letter was then shown to her, and she repeated her denial.

Held that the materiality was sufficiently alleged.

That the allegation in reference to Milo Williams was sufficient.

That the letter was sufficiently identified.

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then and there, on the said trial, upon her oath aforesaid, falsely, corruptly, and wilfully, &c. did depose and swear (amongst other things) in substance and to the effect following, that is to say, that she (meaning the said Mary Ann Bennett) never got a Mr. Milo Williams (he, the said Milo Williams, being then present in Court during the said trial) to write a letter for her, and that she (meaning the said Mary Ann Bennett) did not see the said Mr. Milo Williams at the house of the father of the said prisoner Shadrach Lewis when the said letter was written, and that she (meaning the said Mary Ann Bennett) never saw the said Mr. Milo Williams at the said house of the said father of the said prisoner Shadrach Lewis, and that she (meaning the said Mary Ann Bennett) never saw the said Milo Williams in any house, and that she (meaning the said Mary Ann Bennett) never saw the said Milo Williams more than once, and that the said Shadrach Lewis and Isaac Hopkins violently, feloniously, and against the consent of the said Mary Ann Bennett ravished her."

"The indictment then proceeded to negative the truth of the matters sworn in these terms:—

" 'Whereas in truth and in fact the said Mary Ann Bennett did get the said Milo Williams to write a letter for her,' &c.

"And concluded in the usual form.

"It was proved, that, at the trial of Lewis and Hopkins, the prisoner, then the witness, was asked, on her cross-examination, whether she ever got Mr. Milo Williams (who was pointed out to her in Court) to write a letter for her. That she replied, 'No, I did not.' That a letter was then exhibited to her, and the question was repeated as to 'this letter.' That she repeated her denial. She was then asked, 'Did you not get Mr. Milo Williams to write this letter at Lewis's father's house?' She replied, 'I did not.' She was then asked whether she

ever saw Williams at Lewis's father's house. She said, 'I never did.' Again, whether she ever saw Williams? She replied, 'Once at Chepstow; never but once.' She was then further asked whether she ever saw Williams at her father's house. She replied, 'Not in any house.'

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"The questions were afterwards in substance repeated to her by the Judge, but she persisted in the same denials.

"She deposed to the perpetration of a rape on her person by both prisoners in succession, each assisting the other.

"After the trial of the indictment for perjury the letter in question which had been given in evidence to contradict her on the trial for rape, was sworn by Milo Williams to have been written at the house of the father of Lewis after the committal for rape, by himself upon her suggestions, read over to her by him, signed by her with her mark, and by him taken away for transmission to Lewis in Gloucester gaol. It was as follows:—

"St. Briavall's Common,

"January 4th, 1850.

"Shadrach Lewis.

"Dear Friend,

"Your master Mr. Milo Williams called to see your father about your unfortunate situation. I have told him I will do all I can to clear you, and I am glad I was at your father's house when Mr. Williams called. I should not have went to the police about the matter at all if I had not been persuaded by Betty Wood and Nany Vine. I had too many backers or I should not have troubled about it. If you are as willing as myself when you return I have no doubt all will be well as it was before. Your father is well.

"I am, yours &c.

"Witness,

"Milo Williams.

"MARY ANN ^{her} + BENNETT."
mark.

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“ Other confirmatory proof of the truth of Mr. Williams’ statement was given, and the jury found the prisoner Guilty on all the assignments of perjury except on that assigned on the allegation that she never saw Williams but once (which there was no proof to negative) and the assignment on the allegation of rape itself, the sufficiency of which therefore it is not necessary to consider.

“ For the prisoner it was objected,

“ That the materiality of the matters assigned as perjury was not sufficiently alleged in the indictment.

“ That the reference to the letter was too vague and general, and not properly pointed to the particular letter in question.

“ That the reference to Milo Williams and to Lewis’s father’s house were not properly introduced by an averment.

“ That the letter produced in evidence was not sufficiently identified with the statements in the record to support them.

“ It was also contended that the whole transaction of the letter was not sufficiently material to the charge of rape, but I thought it clearly was so under all the circumstances in proof before me, and I did not reserve this objection.

“ I respited the judgment and reserved the other objections for the Court of Criminal Appeal.

“ T. N. TALFOURD.”

M. Mahon, for the prisoner.—It was charged as a material question whether the prisoner ever got *one* Milo Williams to write a letter for her, to which she swore that she never got *a Mr.* Milo Williams to write a letter for her. It is quite possible that the question and answer may have referred to two distinct persons. There is nothing in the indictment to connect them as the same person. In one

part of the indictment it is *Mr. Milo Williams*, in others only *Milo Williams*, the one not referring to the other as the said *Milo Williams*, or in any other way connecting them. [*Alderson*, B.—It is not *Milo Williams* alone, but it is a *Milo Williams* the writer of the letter.] The letter produced in evidence was not material, nor was it sufficiently identified with the letter referred to upon the record. In the next place it was quite immaterial whether the prisoner saw *Milo Williams* at the house of the father of *Shadrach Lewis*, or even whether *Shadrach Lewis* had a father. [*Lord Campbell*, C. J.—It may have been material as a matter of evidence ; there is a positive averment that it was material.]

Powell, for the Crown, was not called upon.

LORD CAMPBELL, C. J.—The *Milo Williams* who wrote the letter is the *Milo Williams* who was present in Court, to whom the evidence applied, and who is, I think, sufficiently identified throughout. As to the objections in regard to the letter, the matters alleged to be material, were found to be so. I think the indictment was sufficient, and the conviction must be sustained.

ALDERSON, B.—I am of the same opinion. I had some doubt whether the allegation as to the letter was sufficient. The writing of a letter by a *Milo Williams* may or may not be material, but the writing a particular letter by a *Milo Williams* upon an occasion referred to appears to be sufficient. If that be so, there is no difficulty at all, because there was one *Milo Williams*, and when the prisoner swears, that *Milo Williams* is pointed out ; this identified him with the previous averment.

COLERIDGE, J.—I have had considerable doubt, but I have come to the conclusion that the indictment is good. It would have been clear if the *Milo Williams* first mentioned had been subsequently referred to as *the said Milo*

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Williams, but the writing of the letter amounts to the same thing, and the material question was, whether she got a person named Milo Williams to write the letter.

PLATT, B., and TALFOURD, J., concurred.

Conviction affirmed.

THE QUEEN *against* WILLIAM FORD,

IN

THE QUEEN *against* FORD, HIGGINSON, AND MADDOCK.

1851.

Saturday,
April 26.

CROSS-EXAMINATION.

“THE prisoner was indicted for a burglary in the dwelling house of Edward Johnson, and stealing therefrom two hams. It was clearly proved that the burglary had been committed by some person or persons, and that a large and small ham had been stolen. The next morning but one after the burglary Higginson and Maddock, being found in possession of the large ham, were apprehended. Maddock, while in custody, made a statement to a policeman, in consequence of which the policeman went with Maddock to Ford, and asked Ford, ‘Where the hams were that he had bought of Higginson?’ Ford at that time denied having any hams; but, on the way towards his house, he said to the policeman, ‘I have the *little* ham at home, but I know nothing at all about the *big* ham.’

“The policeman added, that neither he nor Maddock had said anything about little or big hams in Ford’s hearing before Ford made this statement. On cross-examination the policeman was several times asked whether Maddock did not say in Ford’s hearing, when he first met with Ford, ‘That is the man that bought the big and the little ham,’ which he as often denied. The prisoner’s Counsel then proposed to put his deposition into his hand, to desire him to read it, and, having done so, to ask him, ‘Whether he adhered to the statement that nothing had been said about the big or little ham in Ford’s hearing, before Ford made the statement about them.’ But the prisoner’s Counsel

Upon the cross-examination of a witness for the prosecution, counsel for the prisoner ought not to be allowed to put the depositions into the witness’s hands and ask him if he persists in the statement he has already made in his evidence in court.

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did not propose to put the deposition in evidence. The deposition was signed by the policeman, and contained a statement that when the policeman met Ford, Maddock said, 'That is the man that bought the big and little ham.'

" I consulted Mr. Justice Patteson, and finding that he had an impression that the course proposed had been permitted by some of the learned Judges, but that his opinion was opposed to it, and entertaining myself a very decided opinion against such a course, and having on a previous day in the same Assizes refused to permit it to be adopted, I thought it better to refuse to permit it in the present instance; but out of respect for the opinion of any learned Judge who might have permitted such a course, and in order that a point so likely to recur at the Sessions as well as at the Assizes might be finally settled, to reserve this case for the opinion of her Majesty's Judges.

" And I respectfully request their opinion, whether the prisoner's Counsel was entitled, as a matter of right, to put the deposition into the witness's hand to desire him to read it, and then to ask him whether he adhered to the statement he had made.

" William Ford was convicted, and sentenced to twelve calendar months' imprisonment, with hard labour.

" CHAS. S. GREAVES,
" Stafford Assizes, 1851."

LORD CAMPBELL, C. J., upon this case being called on, said:—This point has been already decided in a case of which my Brother Parke has furnished us with his MS. note, which I will read:—

" Some cases occurred before my Brother Coltman at York, and myself at Liverpool, in which the Counsel for the prisoner, in cross-examining a witness for the prosecution offered to put into his hand his deposition before the magistrate, and then proposed to ask him whether, having

looked at the paper, he still persisted in the statement already made in his evidence in Court. We had some doubt as to the propriety of this course, but it having been permitted by some Judges we thought it right to allow it. As it is very desirable that uniformity should prevail in the practice in this respect, I have to request the opinion of the Judges whether we were right.

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“J. PARKE.”

Dated 28th April, 1843.

ANSWER.

“The Judges are of opinion that the course pursued in this case is inexpedient, and ought not to be allowed for the future.

“29th April, 1843.

DENMAN, C. J.,
TINDAL, C. J.,
PARKE, B.,
ALDERSON, B.,
PATTESON, J.,

WILLIAMS, J.,
COLTMAN, J.,
ERSKINE, J.,
ROLFE, B.,
CRESSWELL, J.”

After that decision, in which we fully concur, it is not necessary that this point should be argued. Such a practice is contrary to principle, and ought not to be allowed.

ALDERSON, B.—The practice might be made the means of inducing the jury erroneously to believe that a witness was giving testimony at variance with his previous statement.

COLERIDGE, J., PLATT, B., and TALFOURD, J., concurred.

Conviction affirmed.

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Saturday,
April 26.

The prisoner was indicted for larceny. The jury found a verdict that the goods were parted with conditionally, that the money was to be paid at the time, and that the prisoner took them with a felonious intent. Held to amount to a verdict of guilty.

THE QUEEN *against* SIMON COHEN,

IN

THE QUEEN *against* SIMON COHEN AND JOHN COLLINS.

LARCENY.

“AT the General Quarter Sessions of the Peace for the County of Durham, (before Rowland Burdon, Esquire, Chairman,) on the 30th day of December, 1850, the prisoners were indicted for having on the 10th day of October, 1848, stolen two waistcoats the property of Charles Hall Bowser.

“The prisoner pleaded Not Guilty: on the trial it was proved that on the said 10th day of October, 1848, the prisoners Cohen and Collins called at the shop of the prosecutor Charles Hall Bowser, who was a tailor residing at Chester-le-street, and who agreed to make each of the prisoners a suit of clothes which had to be sent to Newcastle.

“After giving the order one of the two prisoners took the prosecutor to a public-house where he gave him some liquor.

“After their return to the shop, the prisoner Cohen asked the price of two waistcoats which were in the window. The prosecutor said they were 15s. Cohen said, ‘You must go to the lowest price, as it will be ready money.’ The prosecutor said, ‘Then you shall have them for 12s.’ which was agreed to by the prisoner (Cohen). The prisoners had a gig standing at the prosecutor’s shop door, and the prisoner Cohen said he would put the waistcoats into the gig, in which Collins was sitting, to which the prosecutor replied, ‘Very well.’ The evidence proved that Cohen had not any money but that Collins had, and when Cohen went out to the gig the prosecutor said he thought

he went out to get the money from Collins. Cohen had previous to this asked the prosecutor to lend him 30s.

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“Immediately after the waistcoats had been placed in the gig Cohen got in and they drove off full gallop.

“Upon inquiry next day it was found that the prisoners had given a fictitious address.

“From that time up to December, 1850, the prosecutor had been unable to apprehend the prisoners.

“It was contended on behalf of the defence that there was no case to go to the jury, inasmuch as it had been proved by the prosecutor that a complete sale of the goods had taken place, and that he had voluntarily delivered them to Cohen. This was overruled by the Chairman, and the jury found Cohen *Guilty* of stealing the waistcoats, and Collins *Not Guilty*.

“Cohen was discharged on bail to appear when called upon to receive the judgment of the Court.

“The Jury, in answer to the Chairman, said in their opinion the waistcoats were parted with conditionally, that the money was to be paid at the time, and that Cohen took them with a felonious intent.

“The question for the opinion of the Court, is, whether the conviction of Cohen for larceny was proper.

“R. BURDON,

“Chairman.”

Huddleston, for the prisoner.—This case turned upon the meaning of the word “conditionally.” If the prosecutor had parted not only with the possession but also with right of property, the non-performance by the prisoners of the condition that they were to pay for the waistcoats would not make it larceny.

ALDERSON, B.—What is meant is that the property was not absolutely parted with, but handed over upon the con-

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dition that the prisoners should pay for it. If they did not pay the right to the property was not transferred.

LORD CAMPBELL.—The conviction must be affirmed.

ALDERSON, B., COLERIDGE, J., PLATT, B., and TALFOURD, J., concurred.

Conviction affirmed.

TRINITY TERM,

IN

THE FOURTEENTH YEAR OF THE REIGN OF VICTORIA.

THE QUEEN *against* JOHN CLEMENTS AND JOHN SMITH.

1851.

*Saturday,
May 31.*

DEPOSITIONS.

“ KENT.—At the General Quarter Sessions of the Peace of our Lady the Queen, holden at Maidstone, in and for the county of Kent, on Tuesday, in the week next after the 28th day of December, to wit, the 31st day of December, in the fourteenth year of the reign of our Sovereign Lady Queen Victoria, before the Right Honourable Charles Earl of Romney, Aretus Akers, James Espinasse, Esquires, and others their associates, Justices of our said Lady the Queen, assigned to keep the peace of our said Lady the Queen in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanours in the same county perpetrated; a bill of indictment was preferred against John Clements and John Smith for larceny.

The deposition of a witness absent from illness may be used before the grand jury.

Query, can objection be taken to any proceeding before the grand jury.

“ Upon the bill being sent before the grand jury, and the prosecutrix not appearing, they sent for the attorney for the prosecution, and intimated to him that they could not proceed with the bill without having the depositions of the prosecutrix. Whereupon Counsel for the prosecution applied to the Court that the prosecutrix was an aged woman and too ill from infirmity to travel to the sessions, that the depositions had been taken by the magistrate at the dwelling-house of the prosecutrix in the presence of the prisoners who had had an opportunity of cross-examining the prosecutrix, and that the depositions were signed by

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the prosecutrix and the magistrate, and that the witnesses to prove these facts and the illness of the prosecutrix were in attendance, and their names were on the back of the bill of indictment, which facts were afterwards proved on the trial, and the depositions of the prosecutrix read in evidence in pursuance of the statute 11 & 12 Vict. c. 42, s. 17. Counsel for the prisoners objected to the depositions being sent before the grand jury on the ground that in the absence of the prosecutrix her depositions were not admissible as evidence before the grand jury either at common law or by statute 11 & 12 Vict. c. 42, s. 17, which makes it lawful to read such deposition in evidence ‘upon the trial,’ and it was contended that the word trial meant trial before the petty jury, and not to the preliminary proceedings before the grand jury. The Court overruled the objection, and ordered the depositions to be sent to the grand jury, who thereupon returned a true bill, to which the prisoners pleaded ‘Not Guilty,’ and upon which they were tried, convicted, and sentenced to nine calendar months’ imprisonment in the house of correction with hard labour where they now remain.

“ On the application of the prisoners’ Counsel the Court of Quarter Sessions consented to submit for the opinion of the Judges of the Court of Criminal Appeal, Whether under the circumstances above stated it was competent to the Court of Quarter Sessions to send the depositions of the prosecutrix before the grand jury to be read by them as evidence in her absence.

“ ROMNEY,
“ Chairman.”

No Counsel appeared on either side.

LORD CAMPBELL, C. J. — We entertain considerable doubt whether we have authority, sitting here, to adju-

dicare upon this question. We also entertain doubt whether such an objection would be sufficient to invalidate the conviction. But, as our opinion is asked, we think that, upon the construction of the Act, the depositions may be made use of, as well before the grand jury as the petty jury. The statute says that, upon the trial of the person accused, it shall be lawful to read such deposition as evidence on such prosecution. We think that the word "trial," as it is there used, coupled with the word "prosecution," means proceedings before the grand jury as well as before the petty jury. The conviction, therefore, must be affirmed.

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ALDERSON, B.—It is very questionable whether you can take any objection to what has been said before the grand jury.

COLERIDGE, J., PLATT, B., and TALFOURD, J., concurred.

Conviction affirmed.

THE QUEEN *against* SAMUEL HILL.

1851.
Saturday,
May 31.

Case reserved by the Honourable Justice Coleridge.

EVIDENCE.

When a lunatic is tendered as a witness, it is for the judge to determine whether he shall be admitted.

If, upon his examination upon the *voir dire*, he exhibits a knowledge of the religious nature of an oath, it is a ground for his admission.

Semble—such a witness cannot be objected to, after examination in chief, on the ground that he is *non compos mentis*.

“THE prisoner was tried before me, assisted by my Brother Cresswell, at the last February Sittings of the Central Criminal Court, for the manslaughter of Moses James Barnes ; he was convicted, but a question was reserved for the opinion of the Court of Appeal as to the propriety of having admitted a witness of the name of Richard Donelly on the part of the prosecution.

“The deceased and the witness were both lunatic patients in a Mr. Armstrong’s Asylum at Camberwell, at the time of the supposed injury, and they were at that time placed in a ward called the infirmary.

“It appeared that a single sane attendant (the prisoner) had the charge of this ward, in which as many as nine patients slept, and that he was assisted by three of the patients, of whom the witness Donelly was one.

“It was opened for the prosecution, that the witness Donelly was to be called, and therefore, on both sides, some evidence was gone into in the course of the case, and before he was called, in order to found and to meet the objection to his competency.

“Muncaster, who had been an attendant in charge of the infirmary ward before the prisoner, stated, ‘Donelly labours under the delusion that he has a number of spirits about him, which are continually talking to him. That is his only delusion ; he has never been free from it to my knowledge since I have known him.’

“Joseph Stuart Burton, the medical superintendent, stated the same ; but added, ‘I believe him to be quite capable of giving an account of any transaction that happened be-

fore his eyes. I have always found him so. It is solely with reference to the delusion about the spirits that I attribute to him the being a lunatic. When I have had conversation with him on ordinary subjects, I have found him perfectly rational; but for this delusion I have seen nothing in his conduct or demeanour in answering questions, otherwise than the demeanour of a sane man.'

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"James Hill, a doctor in medicine, who had been formerly medical superintendent at the same Asylum, stated, 'The memory of an insane man is not necessarily affected; it frequently is, and frequently is not. I have seen Dr. Haslam's work. I do not agree in all cases with his remark, that memory appears to be perfectly defective in all cases of insanity. Certainly not. It may probably be so in the generality of cases. Madness is commonly accompanied by a great deal of excitability of the brain, but in some cases it is not; it is very often accompanied by physical irritation of the brain; it is one of the most common causes of madness, either primarily or secondarily. In certain cases of acute madness the ideas in the mind of a madman succeed each other more rapidly than in the mind of a sane man, and in a more confused manner; that is, where there is actual irritation of the brain; it is quite possible for a man to entertain a delusion on one subject, without its affecting his mind generally on other subjects; in most cases where a delusion prevails and the man is mad, the rest of his mind is affected to some extent. I agree with Dr. Pritchard, that, in monomania, the mind is unsound, but unsound on one point only. There is no doubt, however, that all the mental faculties are more or less affected, but the affection is more strongly manifested in some than in others. It is difficult to ascertain without strict inquiry the extent of a madman's delusions; they have sometimes the power of concealing their delusions even from their medical attendants, especially after having been frequently conversed with about the delusions, and knowing

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that they are the cause of their detention ; but it is unfrequent ; it is a doubtful point whether what they say is not for a particular purpose, for instance to attain liberty ; if a madman has an object to answer, he is sometimes capable of concealing his delusions. I have known it, but not as a general rule. They are probably capable of a good deal of dissimulation ; many are, I know ; but many do not exhibit that tendency, it is common for a certain class of madmen to exhibit a great deal of cunning. Donelly labours under a delusion with respect to spirits ; he is, in the strict sense of the word, a lunatic, inasmuch as he labours under a delusion ; he is not excitable by any means. I have known instances of lunatics concealing their delusions, but in all these cases there is an evident and apparent motive. I have known decided lunatics, not monomaniacs, in what are called lucid intervals, capable of going about and managing their own affairs. In ordinary cases there is no particular difference between a monomaniac apart from his particular delusion, and an insane person in a lucid interval ; during the lucid intervals of the insane person he is well, but a monomaniac is a monomaniac all the time ; in the instance of a monomaniac you produce the insanity the moment you touch the particular chord ; it is possible that you might revive insanity in a madman during a lucid interval by touching on the same subject if it is but recent. I always found Donelly perfectly rational, except on the subject of his particular delusion.'

“ Donelly was then called, and before being sworn was examined by the prisoner's Counsel : he said, ‘ I am fully aware I have a spirit, and twenty thousand of them ; they are not all mine, I must inquire, I can where I am, I know what are mine. Those ascend from my stomach and my head, and also those in my ears. I don't know how many they are, the flesh creates spirits by the palpitation of the nerves and the rheumatics, all are now in my body and

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round my head. They speak to me incessantly, particularly at night ; that spirits are immortal I am taught by my religion from my childhood ; no matter how faith goes all live after my death, those that belong to me and those that do not. Satan lives after my death and so does the living God.' After more of this kind he added, ' They speak to me incessantly, *they are speaking to me now*, they are not separate from me. They are round me speaking to me now, but I can't be a spirit for I am flesh and blood ; they can go in and out through walls and places which I cannot. I go to the grave, they live hereafter, unless indeed I've a gift different from my father and mother ; that I don't know. After death my spirit will ascend to heaven, or remain in purgatory. I can prove purgatory. I am a Roman Catholic. I attended Moorfields, Chelsea Chapel, and many other chapels round London. I believe purgatory. I am taught that in my childhood and infancy. I know what it is to take an oath, my catechism taught me from my infancy, tells me when it is lawful to swear ; it is when God's honour, our own, or our neighbour's good requires it. When man swears he does it in justifying his neighbour on a prayer book or obligation ; my ability evades me while I am speaking, for the spirit ascends to my head. When I swear I appeal to the Almighty ; it is perjury the breaking a lawful oath, or taking an unlawful one, he that does it will go to hell for all eternity.'

"He was then sworn and gave a perfectly connected and rational account of a transaction which he reported himself to have witnessed. He was in some doubt as to the day of the week on which it took place, and on cross-examination said, ' These creatures insist upon it it was Tuesday night, and I think it was Monday,' whereupon he was asked, ' Is what you have told us what the spirits told you or what you recollect without the spirits,' and he said, ' No, the spirits assist me in speaking of the date, I thought it was

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Monday and they told me it was Christmas Eve, Tuesday, but I was an eye-witness, an ocular witness to the fall to the ground.'

"The question for the opinion of the Court is, Whether this witness was competent. Sentence has not been passed, but it is postponed until this question has been decided, and the prisoner remains in custody.

"J. T. COLERIDGE.

"April 25th, 1851."

Collier, for the prisoner (*a*).—It appeared from the statement of the case that Donelly was *non compos mentis*. He was prepared with several authorities to show that a person *non compos* was not admissible as a witness, he should then show why such a rule should not be altered, and if he should fail in convincing the Court upon this point, he should proceed to show that this case was an exception, and that the evidence ought to have been rejected. In the first place he would assume that the witness was *non compos* in every sense of the term. [*Lord Campbell*, C. J. —His being in confinement is not in itself sufficient evidence of that. You may, however, take it in this case that the witness was *non compos mentis*.] And that he had not at the time a lucid interval. It has been held that the objection may be taken after the witness has been examined, *Jacobs v. Layborn* (*b*). [*Lord Campbell*, C. J. —Not upon such a ground as this. The only question here is, whether Brother *Coleridge* was right or wrong in admitting the witness.] The evidence was admitted by *Cole-*

(*a*) This case was first called on on Saturday 26th January, 1851, when Mr. *Collyer* applied to have the case postponed, on the ground that he had not had time to look into the authorities. The Court observed that it was a very important question, and might therefore be adjourned to the Saturday following.

(*b*) 11 M. & W. 685.

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ridge, J., saying he should leave it to this Court to decide the question of admissibility. He would now proceed to refer to the authorities. In Com. Dig. "Testmoigne—Witness," A, 1, it is laid down: "Every witness must be credible. Therefore a man of non-sane memory shall not be allowed as a witness, as an idiot, a lunatic during his lunacy. But a lunatic may be a witness *in lucidis intervallis*." It is said that an infant is not an admissible witness when he does not understand the nature of an oath, but the real objection to an infant of tender years is rather that the mind is not sufficiently developed for the jury to be enabled to rely upon its accuracy (a). When he has arrived at a more perfect state of mind his evidence is admitted without the test, the maturity of his mind alone being relied upon. Whether he understands the nature of an oath is but one test of the state of his mind. And it does not follow that the evidence of a lunatic is admissible merely because he can explain the nature of an oath and its consequences. Many lunatics might be fully competent to explain this, and yet not have the inclination or the capacity to describe a course of events with accuracy: Buller's Nisi Prius (b). No mention is made of any qualification under which a lunatic shall be admissible; there is certainly one exception and that is during a lucid interval, but that means when the man is not a lunatic. [Alderson, B.—There is another qualification which is omitted to be made, and that is that such evidence is admissible in cases of necessity.] That has never been so held in the case of a lunatic witness. [Alderson, B.—All that I mean is that you cannot take what is there written literally.] The first case he would refer to was *Rex v. Eriswell* (c), in which Buller, J., referring to a pauper who had become insane, said, "It will be proper to premise that I consider

(a) See Bul. N. P., "Children, when good witnesses."

(b) 283. a., 292. b.

(c) 3 T. R. 707.

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the pauper as dead, he being in such a state as renders it impossible to examine him." The same observation, in substance, is made by Lord Kenyon. This case establishes the general proposition that when a man is insane he cannot be examined as a witness. He then referred to *Currie v. Child* (a), *Bennett v. Taylor* (b), [Lord Campbell, C. J.—The question is in what sense the word "insane" is used in those dicta. If it means so insane as not to be relied on at all, it does not apply to this case.] He apprehended that it meant all persons who were proved to be *non compos mentis*. The same doctrine was laid down in Alison's "Practice of the Criminal Law of Scotland;" in Burnett's "Practice of the Criminal Law of Scotland," and also in Gabbett's "Practice of the Criminal Law in Ireland." The same rule prevailed also both in the canon and the civil law. [Coleridge, J.—You cannot take either the canon or the civil law as a criterion.] He then referred to "*Muscardus de Probationibus*" (c), "*Grotius de Jure Belli ac Pacis*" (d). He quoted these authorities in support of the general proposition that a person *non compos mentis* is not an admissible witness. As to what was meant by *non compos mentis* he cited the judgment of Sir John Nicholl, in *Dew v. Clark* (e). [Lord Campbell, C. J.—There is an absurdity in admitting testimony of the sanity of a witness from other persons, and, on the other hand, not allowing them to judge when they see the party himself. Alderson, B.—The question is, whether the party is *non compos* altogether, or only *non compos quoad hoc*.] In Taylor's Med. Jur. (f) it is said, "In a real case of monomania it is not to be supposed that a man is insane upon one point only, and sane upon all other matters. The only admissible view of this disorder is that which was taken by

(a) 3 Camp. 282.

(c) Conclusio, 828, p. 373.

(e) 3 Add. Ecc. Rep. 79.

(b) 9 Ves., jun., 381.

(d) Lib. 2, c. 13, s. 2.

(f) P. 767, "Monomania."

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Lord Lyndhurst in one of his judgments (*a*). In monomania the mind is unsound; not unsound in one point only, and sound in all other respects, but this unsoundness manifests itself principally with reference to some particular object or person." There is no such thing as partial insanity. Every monomaniac is incompetent. There is no reported case in which it has been held that the admission of a lunatic's evidence depends upon the extent of his lunacy. But supposing that such evidence may be admitted in a civil case, there is a wide distinction between that, and admitting it in a criminal proceeding. He then referred to *Hadfield's case* (*b*), where Mr. Erskine, in reference to Lord Hale's observation upon partial and upon total insanity, observed, "I am bound to admit that there is a wide distinction between civil and criminal cases." If, in the former, a man appears upon the evidence to be *non compos mentis*, the law avoids his act, though it cannot be traced or connected with the morbid imagination which constitutes his disease, and which may be extremely partial in its influence upon his conduct.

A lunatic who commits a crime may appear perfectly sane upon that point. Yet he is not punished, upon the principle that he was insane, and therefore did not know when he was doing wrong. But that does not apply to civil proceedings. The principle laid down by Mr. Erskine is perhaps too general, inasmuch as a man may make a will if his incompetency does not extend to any matters connected with it. It is said that the Judge is to decide whether the witness is admissible, and this he is to do before he has heard him utter a word upon the matter upon which he is to give evidence. The question is not only whether the man is sane upon the nature of an oath, but whether he is sane upon the facts. The witness may have been altogether insane at the time he supposed himself to be the witness of certain facts, and yet,

(*a*) See *Dew v. Clarke*, 5 Russ. 163.

(*b*) Howell's St. Tr. vol. xxvii. p. 1307, *et seq.*

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at the time of the trial, he may be sane upon the nature of the oath, and qualified to give a collected account of those imaginary grievances. If the Judge is to be called upon to decide under such circumstances, Counsel for the prisoner should at least have the opportunity of calling medical witnesses. Under all the circumstances, he submitted that the evidence of Donelly was inadmissible.

Sir *F. Thesiger* (with him *Clarkson* and *Bodkin*) for the Crown was not called upon.

LORD CAMPBELL, C. J.—This is a subject of great importance, and ought to be solemnly decided. The case has been very ably argued, but I entertain no doubt upon the matter. I think the rule was properly laid down by Parke, B., in an unreported case to which he has referred us, namely, that it is for the Judge to say, when the party is presented as a witness, whether he is a competent witness, whether he has a proper sense of religion in his mind and knows the nature of an oath, if so, then he is admissible, and it is for the jury to determine the amount of credit to be given to his evidence. Various authorities have been cited to show that a person *non compos mentis* is not admissible. But the question is, in what sense is *non compos* used? If a man is so *non compos mentis* as not to know the nature of an oath, he ought not to be admitted; if he is aware of the nature of an oath, he ought to be admitted. I think that is the proper line to be pursued. I entertain no doubt my Brother Coleridge was quite right in admitting the witness in this case. One medical witness said, “I believe him to be quite capable of giving an account of any transaction that happened before his eyes.” Another said, “It was quite possible for a man to entertain a delusion upon one subject, without its affecting his mind generally on other subjects; and he always found the witness perfectly rational, except upon the subject of this particular delusion. The proposition contended

for is that every monomaniac must be rejected. That would be highly inexpedient, as excluding in many possible cases very necessary evidence. As in the present case, where a number of lunatics are under the care of one person, if such evidence were not admitted it would be impossible to obtain any other evidence of the outrages committed upon such persons. The state of the witness's mind may be brought out on cross-examination to show that no confidence can be given to his statements. The conviction, therefore, must be affirmed.

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ALDERSON, B., was of the same opinion.

COLERIDGE, J.—The Court has been furnished with cases in which the proposition is stated without qualification that a person *non compos mentis* should not be admitted as a witness. In those cases it was not necessary that any qualification should have been expressed. The general question of the competency of a witness was regarded very differently in former times. The examination of Donelly showed that he was a man with a diseased mind; but the disease was of such a character as not to operate upon the matter in question. With regard to memory he was in the state of most other persons. With regard to the nature of an oath, he was unusually competent; it therefore appeared to me that his evidence ought to go to the jury; but if it should have appeared that his evidence was such that the jury could not safely have acted upon it, it was their duty to disregard it.

PLATT, B.—The question necessary for the Judge to consider was, whether the witness understood the nature of an oath, and the consequences of not observing it. In the present case it is clear that the witness did. That was sufficient to justify the Judge in admitting the evidence.

TALFOURD, J.—I am of the same opinion. Upon the

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principle contended for by the prisoner's Counsel some of the wisest and the best of men would have been excluded from giving their testimony. Martin Luther said he had personally fought with the devil, and Dr. Johnson believed that he had heard his mother call to him in a supernatural manner.

LORD CAMPBELL, C. J., added that, upon the same principle, Socrates himself would not have been admitted a witness, for although he did not believe in the presence of so many spirits, he believed in the presence of one.

NOTE.—See observations upon this case in 15 Jur., part 2, p. 197.

THE QUEEN *against* GEORGE ODDY.1851.
Saturday,
May 31.

EVIDENCE.

“ THE Defendant was indicted for felony at the Leeds Borough Sessions, holden before the Recorder of that borough on 3rd of April, 1851. The indictment contained three counts. The first count charged the defendant with breaking a warehouse, and stealing therein, on 3rd March, 1851, fifty yards of woollen cloth, value 10*l.*, the property of Isaac Boocock, in the said warehouse. The second count charged a simple larceny of the same property on the same day and year. The third count charged that the defendant, on the same day and year, feloniously received the same property, knowing it to have been stolen.

Neither upon an indictment for stealing, nor receiving, can evidence be given that the prisoner had, at the time or previously, other stolen goods in his possession.

“ To these counts the defendant pleaded *not guilty* ; and issue was joined on the part of the Crown.

“ At the trial it was proved that the cloth mentioned in the indictment had been stolen on the night between the 2nd and 3rd of March, 1851, from a mill, and was the property of the party named on that behalf in the indictment.

“ It was further proved that the defendant was found in possession. It was further proved that the defendant, upon the cloth being discovered in his possession, declared that he had obtained the cloth from a woman, who was called as a witness at the trial, on the part of the prosecution, and who swore that it had not been obtained from her.

“ The Counsel for the prosecution proposed further to prove that the defendant's house had been searched within an hour after the property named in the indictment was found in his possession, and that, upon this search, two other pieces of cloth were found in the house, and also that, on the 13th of December, 1850, the defendant had been in

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possession of two more pieces of cloth, and that these four pieces of cloth had been stolen on the night between the 4th and 5th of December, 1850, from another mill, and were the property of different owners, no one of whom was connected with the owner of the cloth mentioned in the indictment.

“ The Counsel for the defendant objected to the reception of this evidence :

“ First, on the ground that it was not receivable in support of either of the first two counts, and could, therefore, not be given unless these counts were abandoned.

“ Secondly, on the ground that, considering the evidence with reference only to the third count, it was not receivable, inasmuch as it did not appear, and was not suggested, that any other four pieces of cloth were delivered to the defendant, or stolen by the person who delivered to the defendant, or stole the cloth mentioned in the indictment ; and that it did not appear that two of the four pieces had not been received by the defendant at the same time or stolen at the same time, or from the same person, as the cloth mentioned in the indictment ; and that it did not appear when the other two pieces were received by the defendant, but did appear that they were not stolen at the same time, or from the same person, with the cloth mentioned in the indictment.

“ The Recorder received the disputed evidence without requiring an abandonment of either of the first two counts ; and, in summing up, told the jury not to apply it to either of the first two counts ; but he told them that it was evidence of guilty knowledge under the third count, without desiring them not to take it into consideration, unless they believed that the four ends of cloth, or some or one of them, were or was delivered to the defendant, or stolen by the person who delivered to the defendant, or stole the cloth mentioned in the indictment, or that any of the four pieces

of cloth was delivered to the defendant at the same time, or stolen from the same person with the cloth mentioned in the indictment.

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“The jury found the defendant *not guilty* on the first count; *not guilty* on the second count; *guilty* on the third count. The defendant was sentenced to be transported for seven years, but execution was respited, and the defendant committed to prison until the question hereafter mentioned should have been considered and decided.

“The defendant is still in prison.

“The questions for the opinion of the Justices of either Bench and Barons of the Exchequer are, whether, under the circumstances above mentioned,

“*First*, the disputed evidence was receivable.

“*Secondly*, the direction to the jury was correct.

(Signed)

“T. F. ELLIS,

“Recorder of Leeds.”

No Counsel appeared for the prisoner.

Pickering for the Crown (a).—In *Reg. v. Dunn* (b), “On an indictment against a receiver for receiving several articles, if it appear that they were received at different times, the prosecutor may be put to his election, but evidence may be given of all the receipts for the purpose of proving guilty knowledge in the receiving at least, of all prior to that on which the prosecutor elects to proceed.” In this case the evidence given to prove the guilty knowledge related to property which, although it had been stolen at different times, was stolen from the same person, and received from the same person. [*Lord Campbell*, C. J.—Why should the admission of such evidence be confined to stealing? Why should it not extend to highway robbery? for, in such a case, the evidence might go to show that, having committed

(a) No Counsel appeared for the prisoner.

(b) 1 Moo. C. C. 146.

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such an offence before, he was likely to commit it again.] In *Reg. v. Davis* (a) also, it was held by Gurney, B., that any receiving, before the one in the indictment, upon which the prisoner is tried, may be given in evidence, even though it should be the subject of another indictment. [*Alderson*, B.—Suppose a person to be charged with breaking into a house with intent to steal, would it be admissible to show that he had before committed a similar offence ?] In *Reg. v. Mansfield* (b), the prisoner was indicted separately for receiving tin, for receiving iron, and for receiving brass. Upon his trial for receiving the tin, it was held that evidence might be given of an endeavour to conceal the brass. The case is analogous to that of uttering forged notes: *Whiley's case* (c)—[*Lord Campbell*, C. J.—You may take it, that, on an indictment for uttering, such evidence is admissible.] Because it is evidence of a guilty knowledge: *Rex v. Ball* (d), *Kirkwood's case* (e), *Rex v. Bales* (f). In all these cases how could it have been possible to have arrived at the fact of the guilty intention, but from the presumption created by the prior fact? It depends entirely upon presumptive evidence. It is said not to be admissible because the prisoner is thereby taken by surprise. That is not so; it does not take him by surprise, because he must know that the possession of various articles of stolen property would raise a presumption of knowledge. A stronger case could not be put than that of *Rex v. Kirkwood*, where, upon an indictment for uttering a forged note of the Bank of Ireland, evidence was admitted of the previous uttering of two forged notes of another banking house. So in the case of forged bills of exchange, as in *Rex v. Hough* (g) the same principle is applied. All the argument

(a) 6 C. & P. 177.

(b) Car. & M. 140.

(c) 2 Leach, 983; and 1 New R. 92. (d) R. & R. 132.

(e) Lew. C. C. 103.

(f) 1 Moo. C. C. 470.

(g) Russ. & R. 120.

that could possibly be raised on the ground of inconvenience was raised in that case, and unless there was some distinction in the application of the principle in that case and in the present it would appear that the evidence in this case could not be shut out. He also cited *Gibson v. Hunter*(a), *Rex v. Clewes* (b), *Rex v. Voke* (c).

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LORD CAMPBELL, C. J.—We are of opinion that the evidence was quite as admissible under the third count as under the first. Upon the second count such evidence might go to show that this was a bad man and likely to commit that offence; but, by the law of England, we do not allow one crime to be proved to show a probability of the commission of another. How can the possession of certain stolen goods show that he had a knowledge that other goods in his possession were stolen? (d). It can only show that he was a bad man, and having committed one offence was likely to commit another. With regard to forgery, the cases go a great way, and we should by no means be inclined to extend the principle to the criminal law generally. There is no ground for saying, that his having received stolen goods is evidence that he received other stolen goods. The conviction, therefore, must be quashed.

ALDERSON, B.—In forgery it is a repetition of the same act; here the man is charged with receiving goods with a guilty knowledge, that cannot be proved by the fact of his having had stolen goods in his possession. That fact rather proves that he stole them.

COLERIDGE, J., PLATT, B., and TALFOURD, J., concurred.

Conviction quashed.

(a) 2 H. B. 288. (b) 4 Car. & P. 221. (c) Russ. & R. 531.

(d) A man has two lots of stolen goods in his possession; he came by both lots honestly; how can the possession of each lot be taken as evidence of a guilty knowledge that the other was stolen?

CORAM

LORD CAMPBELL, C. J.,
 PARKE, B.,
 ALDERSON, B.,

COLERIDGE, J.,
 PLATT, B.,
 TALFOURD, J.

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Saturday,
May 31.

THE QUEEN *against* JAMES EATON,

IN

THE QUEEN *against* JAMES UEZZELL, JAMES EATON, and
 DAVID PARKINS.

(Case reserved by the Right Hon. Baron Parke.)

In an indictment for night poaching, it is not necessary to name any particular close: it is sufficient to say "land in the occupation of B. or C.," as the fact may be.

It is not necessary, when several persons are indicted together, that they should all have been upon the same parcel of land.

If several persons in one party are in parcels of land described in the indictment as in different occupations, it is within the statute.

POACHING.

"THE prisoners were tried before me at the last Assizes at Hertford for night poaching and found Guilty on 9 Geo. IV. c. 69.

"The prisoners Uezzell and Parkins were not sufficiently identified, and therefore acquitted.

"Eaton was found Guilty.

"He was one of three persons who went together, armed with guns, in the night, to destroy game.

"The three were proved to have been together in one of the closes mentioned in the indictment, called the Thirteen Acres, but not for the purpose of killing game in that close, for there was none there nor on one adjoining close, by shooting from it. They were passing along it to another place. One at least of the three was in a close mentioned in the indictment, called the Spring, which had pheasants in it, for the purpose of destroying game in that close, but the

whole three were not. They were all, however, at that time of the same company, and with that common purpose.

“ There is one count in the indictment, the 4th, stating that the prisoners were in inclosed land, occupied by Charles White.

“ The Spring and the Thirteen Acres were contiguous, separated by a fence, and were both in the occupation of Charles White.

“ There is a question whether this will make a difference.

“ I respited the judgment in order to take the opinion of the Judges on this unsettled question.

“ *Vide* 1 Russell on Crimes, Mr. Greaves' note, 476, and *Rex v. Whitaker*, 1 Denison, C. C. 310.

“ J. PARKE.”

No Counsel appeared on either side.

LORD CAMPBELL, C. J.—Upon looking to the fourth count in this case, we are of opinion that the conviction is right, and ought to be affirmed. The confusion in this case seems to have arisen from not referring to the Act of Parliament. It seems to have been supposed the Act contained the word “close,” but it is any “open or inclosed” land. A practice has been introduced of naming in the indictments a particular close, but such a course is totally unnecessary. There must be something to identify the land, but it is enough to say land in the occupation of so and so. If the party occupy fifty fields, and the prisoners are proved to have been in any one of them, it is within the statute. It is immaterial that some are on one side of the hedge and some on the other, although upon this point all the subtlety has arisen.

PARKE, B.—So that if three persons in one party are in parcels of lands described in the indictment as in different occupations, they fall within the statute. They need not necessarily be within the same close. The note in Mr.

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Greaves's work, wherein it is stated that the land should all be in the occupation of the same person, or upon the same waste, is erroneous. I do not think that is the necessary consequence of the statute.

ALDERSON, B.—It is necessary that the land be described, but it may be described by the description of several closes or as being in different occupations. And whether open or inclosed, it must be so described.

COLERIDGE, J., PLATT, B., and TALFOURD, J., concurred.
Conviction affirmed.

SITTINGS AFTER TRINITY TERM,

IN

THE FIFTEENTH YEAR OF THE REIGN OF VICTORIA.

CORAM

POLLOCK, C. B.

PATTISON, J.

PARKE, B.

WIGHTMAN, J.

MARTIN, B.

THE QUEEN *against* MARY HOGAN.*(Case reserved by the Honourable Baron Martin.)*

ABANDONING CHILD.

“AT the last Somerset Assizes, held at Taunton, before me, the prisoner pleaded guilty to the following two counts of an indictment. There were other counts on which no evidence was offered, and an acquittal was taken :—‘ The jurors aforesaid, upon their oath aforesaid, do further present that the said Mary Hogan, being an evil-disposed person, and contriving and intending to injure the inhabitants of the parish of Bathwicke, in the county of Somerset, and unjustly to burthen them with the maintenance of a certain female bastard child, born of the body of the said Mary Hogan, of very tender age, to wit, of the age of four days, and not then named, and unable to move or walk or to take care of, and provide for, herself, or to make known her wants, on the said 18th day of January, at the parish aforesaid, in the county aforesaid, unlawfully and injuriously did abandon and desert the said female bastard child, in the said parish of Bathwicke, without having provided any means whatever for the support of the said child, the said child not being

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Friday,
June 20.

A mother is not indictable for abandoning her *bastard child* without having provided for its support, unless some consequential injury arise to the child. It is not sufficient that she intended to cast upon a parish the burden of supporting the child.

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then and there settled in the said parish of Bathwicke, as the said Mary Hogan then and there well knew ; to the great damage of the inhabitants of the said parish of Bathwicke, and against the peace of our Lady the Queen, her crown and dignity.' ”

There was a second count (a) in the same form, which alleged the intent to injure C. M., J. L., J. F., and T. H. O., then and there being overseers of the poor of the parish of Bathwicke, and concluded “to the great damage of the said C. M., J. L., J. F., and T. H. O., then and there being such overseers as aforesaid.”

“The Counsel for the prisoner moved in arrest of judgment, on the ground that the two counts disclosed no offence. I respited the judgment and discharged the prisoner on her own recognizance to appear and receive judgment at the next assizes, reserving the case for the opinion of her Majesty's Judges, pursuant to the statute.

“S. MARTIN.”

Phinn, for the prosecution.—He was not aware that there was any decided authority to show that a mother was indictable for abandoning her bastard child, although of tender years, with the intention of casting the burden of its support upon the parish. The stat. 5 Geo. IV. c. 83, s. 4, enacts, that “Every person running away and leaving his wife, or his or her children, chargeable, or whereby she or they or any of them shall become chargeable to any parish, township, or place, shall be deemed a rogue and vagabond, and punished accordingly ;” and Wightman, J., in *Reg. v. Maude* (b), held that the statute applied to legitimate children only. He would, however, submit that this was a misdemeanor. In *Chit. Crim. Law* (c), is a form of indictment for giving lodging to a woman who was likely to be delivered of a bastard child, with intent to

(a) Set out in the case.

(b) 11 L. J., M. C. 120.

(c) Vol. ii. p. 700 ; also in 4 Went. 354.

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burden the parish with its maintenance. So, in *Wentworth's Precedents* (a), is to be found a form of indictment for bringing a pauper sick of the small-pox into a parish with intent to burden the parish. In *Reg. v. Renshaw* (b), there was a count in the indictment the same as here, but the validity of the count did not come into question. In *Reg. v. Cooper* (c), also, was a similar count, which was held ill, but in that case the count did not negative that the child had a settlement in the parish; here that objection was provided against by an averment.

POLLOCK, C. B.—We are all of opinion that this indictment cannot be sustained. It is, no doubt, an offence if a person, whose duty it is to take care of a child, so neglects it that it receives some injury; but this indictment is defective, inasmuch as it does not appear that any injury did arise to the child; nor does it appear that the prisoner had the means of supporting it. It may be that the woman was unable just then to take care of the child, that she left it for a time whilst she procured food to save it from starving. With respect to the alleged injury to the parish, the Court is not prepared to go beyond the authorities to be found in the books on this subject, and we find no authority for saying that a person is criminally liable for doing an act, because it may throw upon a parish the burden of supporting a child unable to maintain itself. The parish was bound to provide for the child if the prisoner could not.

PARKE, B., PATTESON, J., WIGHTMAN, J., and MARTIN, B., concurred.

Conviction quashed (d).

(a) *On Pleading*, vol. iv., p. 353.

(b) 2 Cox, C. C. 285.

(c) 1 Den. C. C. 459; *ante*, p. 125.

(d) The Court observed that the case stated that the prisoner had been discharged on her own recognizance: that such a course was not according to the provisions of the statute 11 & 12 Vict. c. 78, s. 1; see App. 1.

MICHAELMAS TERM,
IN
THE FIFTEENTH YEAR OF THE REIGN OF VICTORIA.

CORAM

LORD CAMPBELL, C. J.
PARKE, B.

MAULE, J.
TALFOURD, J.

MARTIN, B.

1851.

Saturday,
November 15.

THE QUEEN *against* WILLIAM MURDOCK.

(Case reserved by the Right Honourable Baron Parke.)

EMBEZZLEMENT—VENUE.

The prisoner and his master lived at Nottingham. The prisoner received money on his master's account at Derby, for which he should have accounted to his master in the course of the week. He did not, nor did his master hear of him till two months after, when they met in Nottingham. The prisoner then said he had spent the money. Held, that there was evidence from which the jury might find that the prisoner embezzled the money in Nottingham.

“THE prisoner was tried before me at the last Assizes for the County of the Town of Nottingham, on an indictment for embezzling two sums, the property of his master, James Macqueen.

“The prisoner was a travelling salesman, and his duty was to go into Derbyshire every Monday, and to sell goods and to receive the money for them there, and to return with it to his master in Nottingham, on a Saturday.

“He received the two sums mentioned in the indictment on the 6th of May, in Derbyshire, and did not return the following Saturday, nor at all, to his master.

“There was no evidence of what became of him till two months after, when he was met by his master in Nottingham, who asked him what he had done with the money, and he said, ‘he was sorry for what he had done; he had spent it.’

spent it.

"The prisoner was found guilty, but as I doubted whether he could be properly convicted on this evidence, of embezzlement in the town of Nottingham, I did not pass sentence.

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"See *Rex v. Taylor*, 3 Bos. & Pul. 596.

"J. PARKE."

No Counsel appeared for the prisoner.

Marson, for the Crown.—Both parties resided in the town of Nottingham: *Reg. v. Squires* (a). It might be said there was no offence in simply receiving, but then there was an omission to account, which made it an embezzlement within the statute 7 & 8 Geo. IV. c. 29, s. 47 (b). Where the money has been received in one county, and the receipt denied in another, the venue may be laid in either county: *Reg. v. Hobson* (c). It may be here said there was no denial in Nottinghamshire. The non-accounting for the money in Nottinghamshire, was equivalent to a denial of the receipt of the money: *Reg. v. Jackson* (d). There was no case that went to show that the prisoner must be tried where he received the money. The offence was completed when he refused or omitted to account. [*Parke*, B.—The felony consists in the abstraction of the money: we do not know when that began].

LORD CAMPBELL, C. J.—The question here is whether there was evidence to go to the jury of an embezzlement committed in the town and county of Nottingham. If there was evidence from which the jury might suppose that the prisoner spent the money in Nottingham, they might come to the conclusion that the embezzlement took place in Nottingham. I think there was evidence for their consideration.

PARKE, B.—I think there was sufficient evidence to

(a) Russ. & Ry. 349.

(b) Embezzlement by clerk or servant.

(c) R. & R. 56.

(d) 1 Car. & K. 384.

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go to the jury by reason of the prisoner not returning, and his not accounting. In *Rex v. Taylor*, the money was received in Surrey, and the denial was made in Middlesex, and it was held that the prisoner might be tried in Middlesex. The mere fact of his having spent the money is not sufficient—he might have substituted other money for it. I think the evidence of his non-accounting was sufficient to make it a felony in Nottingham.

MAULE, J.—I agree with the conclusion of my Brother Parke, but I do not agree with the principle upon which he proceeds. It appears to me the offence was committed when, in the town of Nottingham, the prisoner met his master, and, upon being asked for the money, he did not hand it over. I do not mean the precise pieces, but money to the amount. Unless the party was in the county in which he is indicted, and there omitted to account, it will not do. Suppose the prisoner had received the money and spent it in Derby, and had been there apprehended, as I understand my brother Parke, the man might have been tried in Nottingham. That could not have been so, for the prisoner went on a lawful journey, and if he had never returned to Nottingham, how could it be said that he neglected to account in Nottingham? The cases which say that non-accounting is evidence of an embezzlement, are cases where the party is always in the county where he refuses to account. I think the Court had jurisdiction, and that there was sufficient to go to the jury.

TALFOURD, J., and MARTIN, B., concurred.

Conviction affirmed.

CORAM

LORD CAMPBELL, C. J.
MAULE, J.

PLATT, B.
TALFOURD, J.

MARTIN, B.

THE QUEEN *against* THOMAS GRIFFIN PHILPOTTS.

Case reserved by the Honourable Justice Erle.

PERJURY.

“UPON the trial of the cause, *Doe d. Richards v. Griffiths*, a copy of the will of William Joseph was tendered, and on objection to its admissibility the present defendant, who was then attorney for the lessor of the plaintiff, swore that he had examined the copy produced with the original will in the registry at Llandaff; and upon further objection that the original will was inoperative in respect of a chattel interest, and that therefore either the probate ought to be produced, or an examined copy of the act of probate in the Act Book be proved, the defendant further deposed that he had examined the memorandum at foot of the copy of the will with the entry in the Act Book at the same registry.

“UPON this evidence the Judge offered to receive the document in evidence, but the Counsel for the plaintiff withdrew it.

“UPON the trial of the present indictment it was proved that the defendant had not made either of the examinations which he had so deposed to, and he was found guilty of perjury.

dicted for perjury, and convicted. Held, that as the statements were made with a view to the document being received, and if received it would have been material to the issue, the conviction for perjury must be affirmed.

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Upon a trial of ejectment, in order to prove the copy of a will, P. swore that he had examined it with the original in the registry at L., and in order to prove probate swore that he had examined a memorandum at foot of the copy with the entry in the Act Book at the same registry. This examination did not render the document legally admissible in evidence. The Judge offered to receive it, but it was withdrawn. P. had not made either examination. He was in-

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“ But I reserved the question whether the false oath was relevant and material to the issue then being tried, so as to amount to perjury : as to which the following are the facts—

“ On the trial of the ejectment, the lessor of the plaintiff claimed to be entitled to a term which had been granted to William Joseph and Rees Morgan, jointly ; and his title was, that Morgan had survived Joseph, and assigned the term to Catherine, the widow of Joseph, who married Saunders, and on her marriage made a settlement, under which that term vested in him.

“ The will of Joseph was irrelevant to this title, but the time of his death was a material fact in order to prove that Morgan had survived him, and proof of the probate of the will of Joseph would thus have been relevant evidence towards establishing the plaintiff's title.

“ The purpose of the plaintiff's Counsel in tendering the evidence was to clear a doubt respecting the interest of Joseph in the term which was expected to be raised by the defendant, and after the document was withdrawn the survivorship of Morgan to Joseph was clearly proved by other evidence for the plaintiff. But the purpose for which the document was offered was not stated at the time of the trial of the ejectment.

“ It further appeared that in the registry at Llandaff it was the practice to indorse the act of probate in the original will, and that the book called the Act Book contained a daily account of the matters of business completed in the registry, and that the memorandum at the foot of the document in question was a copy of the entry in this book, relating to the probate of the will of Joseph, and not a copy of the act of probate indorsed on the original will.

“ It follows that the examination of the document tendered with the entry in the book called the Act Book, at Llandaff,

did not render the document legally admissible as an examined copy of an act of probate.

“Judgment was postponed, and the defendant was discharged on recognizances, with sureties, to appear at the next assizes for Monmouth.

“W. ERLE.”

Gray, for the defendant, stated the case.—The question was, whether what the defendant swore was relevant and material to the issue. The issue was the ordinary one of not guilty in ejectment. The question was as to the death of Joseph. [*Lord Campbell*, C. J.—Would not what the prisoner swore be material if it led to evidence of the time when Joseph died?] Yes; but in this case it did not, because the book called the Act Book, did not contain the act of probate—the act of the court, but merely memoranda. It was really no evidence of the probate; and after the defendant had sworn as he did, the document was not admissible. The witness swore that he examined some document, and compared it with some paper. If the document sworn to could not be admitted, it could not be material to show the time of the death. The test, whether evidence is material, is whether what is sworn to by the witness is a fact which the Judge or jury who may have to consider that fact can take into consideration, and whether it can have any bearing upon the question to be decided. The book alluded to was not an Act Book in the sense in which that term is generally understood. The judgment of the court is not entered in any book, but is written on the original will. The witness did not swear that he had examined the will. It is not sufficient that a witness knowingly swears falsely; another ingredient is necessary to constitute perjury, the matter sworn to must be material to the decision of the question being tried. The evidence could at most only go to show whether a certain document should be admitted; it was merely a question

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for the decision of the Judge, who in this case was not the Judge of the ultimate fact. He excluded it as evidence. This was, therefore, no evidence in the case. [*Maule, J.*—Suppose a bill of exceptions to be taken to the ruling of the Judge, the question of perjury or no perjury is to depend upon the judgment of the House of Lords. *Lord Campbell, C. J.*—You must look at the case as it stood at the time when the prisoner swore falsely. The fact of the evidence being afterwards withdrawn is immaterial.] In most of the cases of perjury the real question appears to be, whether the evidence could be admitted, *Rex v. Benesek (a)*, and if so, whether it was of such a nature as would induce the jury to give a verdict either the one way or the other: *Rex v. Gripe (b)*. [*Martin, B.*—Suppose the case of a fine, and the attorney for the plaintiff to swear that he has made the examination, and that there was a proclamation when there was not. Suppose that it afterwards turns out to be immaterial, would that not be perjury?] That case was to be distinguished, there the evidence is admitted. In the present case it never reached the jury, it was no part of the evidence for their consideration. [*Lord Campbell, C. J.*—You make the question of perjury on the part of the witness to depend upon the discretion of the Judge in admitting the evidence.]

Keating and *Huddleston* for the Crown were not called upon.

LORD CAMPBELL, C. J.—The question is whether upon consideration of the whole case as it stood at the time the evidence was given, the conviction was right. It was clearly evidence in a judicial proceeding, and having reference thereto; how, therefore, can it be said to be immaterial? The question was, whether Joseph died before

(a) Pea. Ad. Ca. 93.

(b) 1 Lord Raym. 256.

Morgan, the evidence was tendered to prove that he did. If the evidence had been received it would have been material to the issue which the jury had to determine. With this view the defendant falsely swore that he had examined the document with the originals. The Judge offered to receive the document, but it was withdrawn; had it been received it would have been evidence. The fact of its having been withdrawn could not affect the question of perjury. If it could, this would be making perjury to depend not upon the fact itself, but upon some nice question of law to be decided in the House of Lords. The document might have been admitted; if admitted, the evidence was in support of it, and was material. The conviction must therefore be affirmed.

MAULE, J., PLATT, B., TALFOURD, J., and MARTIN, B., concurred.

Conviction affirmed.

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Saturday,
Nov. 22 (a).

THE QUEEN *against* THOMAS JOHNSON AND
 CHARLES WRIGHT.

LARCENY.

The prisoners, J. and W., by a trick, in which they pretended to be ready and willing and about to pay over to the prosecutor 42 sovereigns, induced the prosecutor to draw a cheque upon his banker for 42*l.*, and to give it to J. At the request of J. the prosecutor went with him to get the cheque cashed. The banker cashed the cheque to the prisoner in notes and gold, as directed by the prosecutor at the time. J. then by another trick got rid of the prosecutor. The jury found that the prisoners throughout intended to get the property of the prosecutor by fraud, and that the prosecutor did not intend to part with his property in the cheque and the money paid upon it until he received the 42 sovereigns. Held, that the prisoners were properly convicted of larceny.

“ AT the general quarter sessions of the peace held in and for the liberty of Peterborough, on the 3rd day of July, 1851, Thomas Johnson and Charles Wright were indicted for stealing a banker's cheque for the payment of 42*l.*, four bank-notes for the payment of 10*l.* each, and 44 sovereigns, the property of John Salmon; and a verdict of guilty was recorded against them, subject to the opinion of the Court of Criminal Appeal on the following case :—

“ The prosecutor was seated at his shop door at Peterborough on the 28th of June last, being market day. The prisoners placed themselves near him, and began a conversation about the sale of some beast and a pony. They disagreed as to the price—Johnson asking 42*l.*, and Wright offering 40*l.*—when the prosecutor said, ‘ Split the difference.’ Johnson then said Wright should have them were it not that his (Johnson's) father would be angry, as Wright had bought two cows over his head. Wright offered to give up the cows. The prosecutor again interposed, and the prisoners appeared to conclude a bargain, that Wright should give Johnson 42*l.* for the beast and pony, and that half-a-sovereign should be returned provided the prosecutor would take the money from Wright and pay it to Johnson, as if the prosecutor were the buyer, and so that Johnson's father might believe him to be the real purchaser.

Held, that the prisoners were properly convicted of larceny.

(a) Argument, Nov. 15; Judgment, Nov. 22.

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“The prosecutor consented to act as a ‘go-between.’ The parties then entered his shop, and Wright counted out 42 sovereigns, 40 of which were passed through the prosecutor’s hands to Johnson, and the other two laid upon the counter. Johnson laid the 40 sovereigns down upon the counter also, with an explanation that his father, ‘who was an austere man,’ would not be satisfied without a cheque upon a banker, and requested the prosecutor to draw one accordingly. The prosecutor went round to his desk, leaving the prisoners with the sovereigns, drew the cheque payable to Thomas Johnson or bearer for 42*l.*, returned and delivered it to Johnson.

“At this time he lost all thought of the money, and when he returned from his desk the sovereigns had disappeared. Johnson said the prosecutor must go with him to the bank to draw the money. The prosecutor consented, and Wright was to remain in the shop until they returned to ‘finish the transaction.’ The prosecutor and Johnson left Wright alone at the shop door, and went to the bank together, when the cheque was cashed by desire of the prosecutor, in four notes of 10*l.* each, and two sovereigns. Johnson took the money and came out of the bank, the prosecutor stopping for a minute or two to give some directions about his pass-book. Instead of returning at once to Wright at the prosecutor’s shop, Johnson requested the prosecutor to accompany him to an inn, where he said his father was to satisfy him as to the business. They went into the inn yard together, when Johnson called for his pony, at the same time slipping a half-sovereign into the prosecutor’s hand, saying, ‘I will go and turn out the beast,’ when he made off by the back entrance of the inn yard, leaving the prosecutor with the half-sovereign and the pony which the ostler delivered to him, instead of returning to the shop (where Wright was to remain) to ‘finish the transaction,’ as the prosecutor all along expected was to be done,

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and the 42 sovereigns handed over to him. The prosecutor, then, for the first time, suspected he had been cheated. He made haste home with the pony, and found that Wright had fled, and the 42 sovereigns also, nobody but prosecutor's daughter having been in the shop. The pony, with the bridle and saddle, was not worth more than 50 shillings. The prisoner Johnson was well dressed, like a farmer, and Wright, like a jobber; and the prosecutor swore that he believed them to be respectable men, and engaged in a *bonâ-fide* transaction, and that he assisted in it purely out of good nature, and was not to receive one penny for what he did. He also stated, that he should have allowed Johnson to go to the bank alone with the cheque, he remaining with Wright and the sovereigns in the shop, had not Johnson requested him to go to the bank with him.

“ The prosecutor expressly stated in his evidence, that he expected Johnson was to come back with him to Wright, and that he was to have the 42 sovereigns from Wright. That he did not expect Wright would ‘cut away,’ and did not consider Johnson at liberty to go off with the money before he (the prosecutor) had the sovereigns in exchange.

“ It was proved, that, during the same morning, the prisoners attempted to engage another party in a similar transaction; and evidence was given to show that the prisoners were acting in concert, and were apprehended in a gig together the same evening about twenty miles from Peterborough, Wright having 45 sovereigns found upon him.

“ The prisoners' counsel contended that these facts would not justify a conviction for larceny. The Chairman, therefore, put the following questions to the jury :—

“ 1st. Did the prisoners throughout intend to get the property of the prosecutor into their possession by fraud, and apply it to their own use?

“*2nd.* Did the prosecutor intend to part with his property in the cheque and change until Johnson returned with them, and the prosecutor received the 42 sovereigns ?

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“*3rd.* If they should find that when the prosecutor gave Johnson the cheque he parted with the property in it and the money obtained for it at the bank, whose property were the 42 sovereigns left upon the counter ?

“ And he directed them that if they found the first question in the affirmative, and the second in the negative, that the prisoners were in law guilty of larceny of the cheque and change ; and further, if they found the first two questions in the affirmative, and found also that the 42 sovereigns left on the counter became the property of the prosecutor when the cheque was delivered to Johnson, or cashed at the bank, and were taken away by Wright, they were guilty of the larceny of those 42 sovereigns.

“ The jury found an original intent to defraud, followed by a general verdict of Guilty, when the prisoners’ counsel applied for a case for the opinion of the Court of Criminal Appeal, and thereupon the Chairman requested the jury to give distinct answers to the several questions before stated ; and they answered the first question in the affirmative, and the second in the negative, and no reply to the third question was thereupon asked for.

“ If upon the facts stated, and findings by the jury, the prisoners are guilty of larceny, the verdict is to stand. The prisoners were liberated upon giving bail to appear and receive judgment.

“ WILLIAM STRONG,

“ Chairman.”

Bliss, for the prisoners, submitted that they were not guilty of a larceny of the sovereigns, or of the cheque, or of the notes given in change for the cheque. The sovereigns were the money of Wright, the prosecutor never had possession of them, and they could not be said to be

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his money. With regard to the sovereigns, however, no question arose upon the case, as the verdict was not given in reference to them. The verdict was found upon the cheque and the notes only. As to the cheque, the prosecutor parted not only with the possession, but with the property also; and the prisoner did with it as the prosecutor intended that he should. There was nothing done *invito domino*; and clearly, therefore, as to the cheque, there was no larceny. The questions submitted to the jury were inconsistent with this, but they also were inconsistent with themselves. The answer to the second question could not apply to the cheque, for the property in the cheque was passed over to the prisoner, and was so dealt with by the prosecutor; nor could it apply to the money not intended to be given to the prosecutor for the cheque, and which had never been in his possession. Finding that the prosecutor did not intend to part with that money is an inconsistent finding. The facts are quite open for one to contend that the cheque was paid over absolutely. The prosecutor went to the bank with the prisoner Johnson at his desire, and for his security. The object of the prosecutor in going was not to retain any right in the cheque. But if the Court should be of opinion that the property in the cheque still remained in the prosecutor, Johnson did nothing in relation to it but what the prosecutor desired should be done. The subsequent proceedings do not affect any act done in respect of the cheque. With regard to the bank-notes, they never were the prosecutor's, or, if they ever were, the property in them passed over to Johnson. This question is not determined by the last answer of the jury, for it is enough if the banker intended to part with the property. The question is not what the prosecutor intended, but also what the agent (the banker) intended. Upon that no question was left to the jury; and upon that there can be no doubt that

the property was to pass to Johnson. The prosecutor never had any property in the notes, nor were they ever in his possession. [*Lord Campbell, C. J.*—Suppose it to have been understood between the parties that the notes should remain the property of the prosecutor, would the intention of the agent affect it?] He submitted that was immaterial. [*Lord Campbell, C. J.*—Would not the transfer of the property depend upon the agreement between the prosecutor and the prisoner?] That might be so but, for the intention of the banker; he had authority to transfer the property, and he did so. It is not a question to be governed by the prosecutor's understanding, but by what the agent really did. [*Maule, J.*—Was it not open to the jury to find that the prosecutor intended to part with the possession only, and not with the property?] That was so, but the jury had only found what was the prosecutor's intention. The facts show that the notes passed by the hands of the banker, in whom the property was, and from whom it passed to Johnson. [*Maule, J.*—The property was not transferred if it was understood to be received for the prosecutor.] In such case the prosecutor never having had possession of the money, it would not be larceny, it might be embezzlement. It is not necessary to constitute larceny that the money should have been in the actual possession of the prosecutor, but it must have reached its ultimate destination, so as to be under the control of the prosecutor: *Reg. v. Watts (a)*. He also cited *Rex v. Bureley (b)*, *Rex v. Waite (c)*, *Rex v. Bull (d)*. Here the prosecutor never contemplated having the notes; he intended that the gold produced in his shop should be received by him in return. *Reg. v. Watts* has carried the doctrine of constructive possession further than any other case.

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(a) *Ante*, p. 342; also 2 Den. C. C. 14.

(b) 2 East, P. C. 571. (c) 1 Leach, 28. (d) Cited in 2 Leach, 841.

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Millor, Q. C., for the Crown.—The property was not parted with in the sense referred to. If in pursuance of a trick Johnson obtained possession of the cheque with intent to appropriate it to his own use, *animo furandi*, that was clearly larceny. In all the cases where property has been obtained by fraud from the prosecutor, it is not against his will, in the sense of the term as it is generally used, but it is so in the legal sense of the term. The moment the cheque was obtained *invito domino*, the larceny was complete. [*Maule*, J.—Would not that doctrine put an end to the distinction between larceny and false pretences?] Not so, because in false pretences there is an intention to part with the property, here there was no such intention. On the next point, the notes were the notes of the prosecutor, and came into his possession in the sense in which “possession” is used in all criminal cases (a). The prisoner had the bare custody of the money. The cases cited on behalf of the prisoner are those wherein a clerk has received money on account of his master, and for which he is responsible. There the lawful possession is in the clerk until paid over in the course of business; but here there was no pretence for saying that the prisoner ever had a lawful possession. All the possession he had was the result of a trick. The prosecutor had a constructive possession. The condition of the parties in respect of the notes would depend upon the previous understanding. If there was no intention to part with the property, it was larceny: there was nothing to make it embezzlement. He cited *Rex v. Spears* (b), to show that a person might have a possession which was not inconsistent with the right of property being in some one else. He also cited *Sir Thomas Plumer’s case* (c). If the prisoner had not a possession

(a) Russ. on Cri. 23, 24.

(b) 2 Russ. on Cri. 155; 2 East, P. C. 568.

(c) Kel. 109.

distinct from, and independent of, that of the prosecutor, it was a larceny.

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Bliss, in reply.—The argument for the Crown would destroy the distinction between false pretences and larceny. However great the fraud practised, if the property be parted with in consequence of that fraud, it is not larceny; however little the fraud, if the property is not parted with, it would (a). The finding as to the cheque was repugnant; it could not be that the prosecutor intended that the cheque should not be transferred, and that the money for the cheque should be paid to him, because that could not be if the cheque was not transferred. [*Maule*, J.—The payment of the cheque being conditional, would not that be larceny?] Perhaps it would, but the jury had not found it so. It is not the question here, whether Johnson had a possession independent of the prosecutor, but whether the prosecutor had a property independent of Johnson. [*Lord Campbell*, C. J.—The question as to whether the possession was in the prosecutor is determined by the jury.] The finding of the jury is not conclusive, but the Court are to examine as they would upon a special verdict: *Bazeley's case* (b), *Rex v. Tilley* (c). The jury, however, merely find the intention, and that does not decide whether the property passed. *Spear's case* was decided upon the principle that the master had possession of the property.

LORD CAMPBELL, C. J.—We are of opinion this conviction was right with respect to the bank-notes and the sovereigns given in exchange for the cheque. The cheque was the property of the prosecutor, and the jury have found that the prisoners throughout intended to get the property of the prosecutor into their hands by fraud, and to apply it to their own use, and that the prosecutor did not intend

(a) See *Russ. & Ry.* 413; 2 *East*, P. C. 669.

(b) 2 *East*, P. C. 571.

(c) 2 *Leach*, C. C. 662.

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to part with it until Johnson returned to his shop. The cheque remaining the property of the prosecutor, he went with Johnson to the bankers, where it was cashed, and it is then expressly found that those two being together "at the bank, the cheque was cashed by desire of the prosecutor in four ten-pound notes and two sovereigns." These words, to which our attention was not called, are material, because they show that the prosecutor exercised a control over the transaction as proprietor of the cheque, and that it was upon his direction that the bankers paid the cheque in notes and sovereigns. These were handed over to Johnson with the permission and by the order of the prosecutor, and Johnson was merely the holder: he had the custody only, and not the possession. The property and the possession were in the prosecutor, and Johnson having received them with an intention to steal, actually did steal them. That being so, it is clearly a case of larceny. The case in 2 East, P. C., is directly in point. The conviction is therefore affirmed.

Conviction affirmed.

CORAM

LORD CAMPBELL, C. J.,
ALDERSON, B.,

PLATT, B.,
TALFOURD, J.,

MARTIN, B.

THE QUEEN *against* WILLIAM CHEAFOR.

LARCENY.

1851.

Saturday,
November 22.

“AT the Quarter Sessions for the County of Nottingham, held at East Retford, on the 7th day of July, 1851, William Cheafor was indicted for feloniously stealing four tame pigeons, the property of John Mansell.

Pigeons tame and reclaimed, kept in an ordinary dovecot, and having access to the open air, are the subject of larceny.

“The pigeons, at the time they were taken by the prisoner, were in the prosecutor’s dovecot, over a stable on his premises, being an ordinary dovecot, and having holes at the top for the ingress and egress of the pigeons, and having a door in the floor which was kept locked. The prisoner entered the dovecot at 12 o’clock at night, breaking open the door and taking away the pigeons.

“The prisoner’s counsel contended that the pigeons, being at liberty at any time to go in and out of the dovecot, and therefore not reclaimed and in a state of confinement, were not the subject of larceny.

“I directed the jury that in my opinion the view contended for by the prisoner’s Counsel was correct, and that the pigeons were not properly the subject of larceny.

“The jury found the prisoner guilty, but judgment has been postponed until the opinion of the Court for Crown Cases reserved has been given as to whether my direction to the jury was right. And whether the prisoner, under the facts stated, was properly convicted.

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CHEAFOR.

“The prisoner is still in custody, not having been prepared with bail to appear and receive judgment.

“G. H. VERNON,
“Chairman.”

No Counsel appeared on either side.

LORD CAMPBELL, C. J.—In this case we think that the direction of the Chairman was wrong, because it comes to this:—Is it possible there can be larceny committed of tame pigeons, because the pigeon from his nature must have egress to the open air, and unless it has a hole for that purpose it cannot get out? According to the direction of the Chairman, there can be no larceny committed of chickens, or geese, or ducks. It was a pure question of fact for the jury, whether the pigeons were tame and reclaimed; the jury seem to have come to a very proper conclusion, that they were tame pigeons and reclaimed. In *Luke's case*(a), it is said that pigeons were held to be the subject of larceny because they are tame and reclaimed, and not on the ground that they were shut up in boxes at the time. It has been supposed that my brother Parke has decided that unless the pigeons were confined no larceny could be committed of them; that is not so, if tame and reclaimed they are the subject of larceny, although they have the liberty of getting out and enjoying themselves.

ALDERSON, B., PLATT, B., TALFOURD, J., and MARTIN, B., concurred.

Conviction affirmed.

(a) 2 Russ. on Cri. 83.

THE QUEEN *against* WILLIAM KEY,

IN

THE QUEEN *against* THOMAS BALL *and* WILLIAM KEY.

1851.

*Saturday,
November 22.*

JURY CHALLENGE.

“THE prisoner in this case was indicted and put upon his trial before me as Deputy Chairman of Her Majesty’s Justices of the Peace acting in and for the county of Leicester, at the Michaelmas General Quarter Sessions of the Peace, held at the Castle of Leicester, in and for the county of Leicester, on Monday, the 13th day of October, 1851, and from thence continued by adjournment to the following day, for having, on the 23rd of September, 1851, at Sileby, in the county of Leicester, stolen a coat of the value of fifteen shillings, the property of Thomas Ball.

“In the same indictment there was a second count, charging the prisoner with receiving the same property knowing it to have been stolen; and a third count, charging the prisoner with a previous conviction for felony.

“The prisoner having been arraigned pleaded ‘Not guilty,’ and having declined to challenge any of the jury the jurors were sworn, and charged in the usual way to inquire whether the prisoner was guilty or not. The jury, having returned a verdict of guilty on the first count, were then charged to inquire into the fact of the previous conviction, when it was contended by the Counsel for the prisoner that the jury must be re-sworn to try the new matter, the Counsel for the Crown admitting that, according to the practice adopted on the authority of a learned Judge, ‘The Right Honourable Mr. Baron Parke,’ the jury must be re-sworn. I directed that the oath, according to

A prisoner was indicted for a felony after a previous conviction; the jury found him guilty of the felony, and were about to be re-sworn to inquire as to the previous conviction. Held, that the prisoner was not then entitled to a challenge.

1851.

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the form hereunder written, which was drawn up in Court from the notes of a Counsel present, and stated to be the form prescribed by the learned Baron before mentioned, should be administered to the jury. On the officer proceeding to administer such oath the Counsel for the prisoner claimed the right of challenge to the jury, on the ground that the prisoner when arraigned had been told by the clerk of the peace that if he would challenge the jurors or any of them he must do so as they came to the book to be sworn, and before they were sworn, and he should be heard. That the jurors were then, for the purpose of trying the fact of the prisoner's previous conviction, 'come to the book,' and accordingly, on the name of the first man of the jury being called, the Counsel for the prisoner peremptorily challenged him; and the Counsel for the prisoner further intimated his intention of challenging in the like manner each man of the jury who had convicted the prisoner on the first count of the indictment.

"I disallowed the claim to challenge the jury, on the ground that the prisoner had been arraigned on the three counts, that his plea had been taken to the whole indictment, and that his right of challenge should have been exercised in the first instance, and before the jury were sworn to make true deliverance between him and our Sovereign Lady the Queen.

"The jury were then sworn as follows: 'You shall well and truly try whether the prisoner has been before convicted of felony in manner and form as in the indictment is alleged;' and the prisoner was given in charge to the jury on the third count of the indictment, charging a previous conviction: he was found guilty, and sentenced to transportation for seven years.

"At the instance of the prisoner's Counsel I reserved the following question for your Lordships' decision;—viz., whether, under the circumstances detailed in this case,

the challenge made on behalf of the prisoner should have been allowed.

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“Execution of the judgment was respited until the above question should have been answered and decided, and the prisoner was committed to prison, where he now remains.

“JOHN DICK BURNABY, Jun.”

Counsel did not appear on either side.

LORD CAMPBELL, C. J.—As to the suggestion that it was the practice of Baron Parke (a) to swear the jury afresh after the conviction, I can only say that I have had the advantage of going two circuits with that learned Judge, and he then followed a different course. The prisoner is arraigned upon the whole indictment, and the jury are first charged to inquire into the larceny, and if they find him guilty they are then to inquire into the previous conviction. It is well that the Chairman in this case was firm, and was not daunted by the attempt to challenge the jury, that the challenge was refused and the prisoner convicted. As to the question reserved, we are all of opinion that there is no pretence for saying that the prisoner was entitled to have a fresh jury. The conviction, therefore, must be affirmed.

ALDERSON, B., PLATT, B., TALFOURD, J., and MARTIN, B., concurred.

Conviction affirmed.

(a) We are informed, that since the statute 14 & 15 Vict. c. 19 has come into operation (3 July, 1851), Parke, B., has directed the jury to be re-sworn upon such an occasion.

See next case.

1851.

*Saturday,
November 22.***THE QUEEN *against* GEORGE SHUTTLEWORTH.**

Where a prisoner is charged with a felony committed after a previous conviction, and also with the previous conviction, the prisoner is to plead to the whole indictment; the jury are first to inquire into the felony *only*, afterwards the previous conviction. The practice is in substance the same as it was before the statute 14 & 15 Vict. c. 19.

“AT the Sessions for the borough of Manchester, held before R. B. Armstrong, Esq., Q. C., Recorder, on the 4th August, 1851, George Shuttleworth was arraigned on an indictment charging him with larceny, and also with having been previously convicted of felony; and according to the invariable practice in that Court before that time both counts were read to the prisoner, and he pleaded ‘Not guilty’ to the whole indictment. At the trial the count for larceny only was read by the clerk of the peace to the jury, and the witnesses in support of that charge were heard, and the jury found the prisoner ‘guilty.’ The clerk of the peace then proceeded to read to the jury the further charge,—that the prisoner had been previously convicted of felony; when the Counsel for the prisoner objected that that charge could not be gone into; and he further stated, that it was his intention, however the jury might decide that question, to move in arrest of judgment generally. The Court decided that the trial should go on; and the certificate of conviction having been put in, and the identity of the prisoner proved, the jury found that the prisoner had been previously convicted of felony. The prisoner’s Counsel then moved in arrest of judgment, contending that the plea of the prisoner, having been taken contrary to the provisions of the late act 14 & 15 Vict. c. 19, s. 9, was void, and that all the subsequent proceedings were a nullity, and that no judgment could be given on a verdict so found. The Court overruled the objection, and sentenced the prisoner to be transported for seven years. The execution of the judgment was respited, and the con-

vict is now in prison. The question for the opinion of the Court of Criminal Appeal is, whether that sentence, under the circumstances stated, was legal, or whether any judgment could be passed on the verdict so given?"

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No Counsel appeared for the prisoner.

Milward, for the Crown, was not called upon.

LORD CAMPBELL, C. J.—If there could have been any doubt upon this question, it is now removed by the stat. 14 & 15 Vict. c. 19, s. 9. The prisoner is to be arraigned upon the whole indictment, but that part only which relates to the larceny (or other principal charge) is to be read to the jury. After they have given their verdict, if a verdict of guilty, then the jury are to inquire into the previous conviction.

ALDERSON, B.—All the Judges are of opinion that the practice is in substance the same as it was before that statute.

PLATT, B., TALFOURD, J., and MARTIN, B., concurred.

Conviction affirmed.

See previous case.

1851.

*Saturday,
November 22.***THE QUEEN *against* JAMES SHRIMPTON.**

Where a Counsel for a prisoner on cross-examination of a witness for the prosecution adduces evidence of good character for a limited time prior to the prosecution, the Counsel for the prosecution may give in evidence a previous conviction, although it did not occur within the time to which the cross-examination was limited; but it would be otherwise if the witness volunteered the statement.

Semble, in the former case the counsel for the prosecution would not be entitled to a reply. In the latter case, he would not be entitled to give evidence to rebut the voluntary statement.

“**WORCESTERSHIRE.**—At the General Quarter Sessions of the Peace for the county of Worcester, held on the 13th day of October, 1851, James Shrimpton was indicted for felony.

“The indictment contained a statement of the previous conviction of the prisoner for felony in the year 1838.

“In the course of the trial John Roberts was examined as a witness for the prosecution. On cross-examination by the Counsel for the prisoner, John Roberts stated that he had known the prisoner for six or seven years last past, and that during that time the prisoner had borne a good character for honesty.

“The Counsel for the prosecution thereupon claimed, under the provisions of the statute 14 & 15 Vict. c. 19, s. 9, to give evidence of the previous conviction of the prisoner in 1838, as mentioned in the indictment.

“This evidence was objected to by the prisoner’s Counsel as inadmissible. First, because the evidence of the good character of the prisoner elicited from the witness Roberts was confined to the period between the years 1844 and 1851, and therefore evidence of the prisoner’s conviction in 1838 was not in answer thereto. Secondly, because Roberts being a witness for the prosecution only, the prisoner did not, by the answers of Roberts to the questions put to him in cross-examination, give evidence of his (the prisoner’s) good character within the meaning of the 14 & 15 Vict. c. 19, s. 9.

“The Court overruled the objection, and the conviction

of the prisoner in 1838 was thereupon given in evidence before the verdict was returned. The prisoner's Counsel addressed the jury for the prisoner, but called no witness on his behalf.

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SHRIMPTON.

“The prisoner was found guilty, and sentenced to nine months imprisonment. But the Court of Quarter Sessions reserved for the opinion of her Majesty's Judges the question of law, whether, under the circumstances above stated, proof of the said previous conviction of the prisoner was properly received in evidence before the verdict of guilty was returned? If the said evidence was properly received, the conviction is to be affirmed; if otherwise, the conviction and judgment thereon are to be reversed.

“JOHN S. PAKINGTON,
“Chairman.”

Selfe, for the prisoner.—The question in this case depended upon the construction of the statutes 6 & 7 Will. IV. c. 111, and the 14 & 15 Vict. c. 19. The practice, under the statute 7 & 8 Geo. IV. c. 28, s. 11, of giving the prisoner in charge to the jury upon the previous conviction at the same time with the subsequent felony was found to work a great injustice; those statutes were therefore passed to remedy the hardship, and the Court will therefore give a liberal construction to the remedial parts of them. [*Lord Campbell*, C. J.—We shall give that interpretation which we think was the meaning of the legislature.] The first question is—Is the man guilty? Evidence of character is admissible upon that issue; but not all evidence of character. On a charge of larceny, evidence would not be admissible of a previous conviction for a rape. So, when evidence of good character is expressly limited to a certain time, no evidence ought in justice to be given of bad character at an antecedent time. Secondly, this was not the prisoner's evidence; the words

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SHRIMPTON.

of the statute, "shall give evidence of his good character," must be interpreted to mean, shall call a witness to his good character. [*Alderson*, B.—It means evidence laid before the jury by the prisoner or his Counsel.] If this were evidence for the prisoner it would entitle the prosecution to a reply, which would hardly be contended for. It is, in fact, part of the evidence adduced by the Crown. [*Lord Campbell*, C. J.—I think there would be no right to reply, the prisoner does not give evidence within the meaning of that regulation.] This point had not yet been decided; there was however a dictum of *Parke*, B., in *Reg. v. Gadbury* (a), which he must admit was opposed to the view of the case he was presenting to the Court. In that case it was not necessary to decide the point. Suppose a witness for the Crown, while under cross-examination, to volunteer evidence of a good character on the part of the prisoner? [*Lord Campbell*, C. J.—That would be a different case; there no evidence in reply could be given.]

No Counsel appeared for the Crown.

LORD CAMPBELL, C. J.—We are all agreed that the conviction was quite right. A witness, in answer to a question put by the Counsel for the prisoner on cross-examination, stated that "he had known the prisoner for the last six or seven years, and that during that time he had borne a good character for honesty." Now the Act of Parliament says: "If upon the trial of any person for any such subsequent felony, such person shall give evidence of his or her good character, it shall be lawful for the prosecutor in answer thereto to give evidence of the indictment and conviction of such persons for the previous felony." Now what was the object of the legislature? To defeat the

(a) 8 C. & P. 676.

scandalous attempts so often made in courts of justice by calling witnesses to character. The mischief is as great when effected upon a cross-examination as in calling witnesses for the prisoner, and perhaps more so. In this case did the prisoner adduce evidence of good character? He laid before the jury evidence calculated to create a false impression,—that he had been a person of good character; the prosecution was therefore justified in giving evidence of the previous conviction. It seems to me that the natural and necessary interpretation to be put upon the words of the Act is, that where the prisoner either by calling witnesses or upon cross-examination attempts to prove that he is a person of good character, it shall be lawful for the prosecutor to go into evidence of the prisoner's previous bad character. We therefore think the conviction right.

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 REG. v.
SHRIMPTON

Conviction affirmed.

REG. v. JOHN GERARD.

[*At the Central Criminal Court, Feb. 5, 1852.*]

Parry, for the defence, called witnesses to character.

Platt, for the prosecution, proposed to call witnesses to rebut that character.

WORTLEY (Recorder), after consultation with CRESSWELL, J., admitted the evidence.

A policeman then gave evidence of three previous charges against the prisoner; one of robbing a woman, and two others of obtaining goods by false pretences.

WORTLEY (Recorder) held that

Parry was entitled to a reply; and that

Platt was entitled to a general reply; but his Lordship also stated that it was not customary to exercise the right of reply when witnesses had been called to character only, but the exercise of the discretion must depend upon the circumstances of each case.

See, however, *Reg. v. Bush*, 5 Cox, Cr. Ca. 284, to which the Recorder's attention had been called.

1851.

*Saturday,
November 22.*THE QUEEN *against* WILLIAM VANN.

NUISANCE.

A pauper who has not the means of burying his deceased child, and who refuses to accept a loan from the parish and apply it to that purpose, is not liable to be indicted for a nuisance arising from the decomposition of the child's body.

“ WILLIAM VANN, the defendant in this case, was tried before me, the Recorder of the borough of Leicester, at the last Michaelmas Quarter Sessions of the Peace for the said borough, for a nuisance, in having refused and neglected to bury the dead body of his deceased child, whereby, and by reason of the decomposition whereof, various noisome stenchs arose, and the air was thereby greatly infected and rendered unwholesome, to the great damage and common nuisance of the Queen's subjects.

“ The defendant, at the time of the decease of his child, which took place on the 17th of August last, was a pauper who had been receiving parochial relief from the parish of St. Margaret, in the Leicester Union, and soon after his child's death he applied to the relieving officer of that parish for assistance to bury the child.

“ It appeared in evidence that an order of the Poor Law Commissioners, under the provisions of the statute 4 & 5 Will. IV. c. 76, s. 58, had been issued to the Guardians of the Leicester Union, which provided ‘ that in certain cases relief might, if the Guardians thought fit, be given by way of loan, and that one of such cases was, where the pauper should receive relief for the purpose of defraying the expenses, either wholly or in part, of the burial of any of his family.’ It further appeared in evidence that the Guardians had laid down a rule (which rule was printed and circulated in the Union), ‘ That the head of the family, or person applying for the assistance of the parish in burying any poor person, must sign an under-

taking to repay the expenses incurred, in case the Guardians shall deem him or her able to do so.'

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REG. v. VANN.

" It further appeared, that at the time the defendant applied to the relieving officer for assistance to bury his child, he was required, in conformity to the rule laid down by the Guardians, to sign a document to the following effect:—

" ' I, William Vann, the undersigned, do hereby agree on demand to repay to the Guardians of the Poor of the Leicester Union, the sum of seven shillings, advanced to me by way of loan, in payment for coffin and ground for my child.'

" The defendant refused to sign this document, and the relieving officer refused to render him any assistance in the burial of the child. It was proved that the defendant removed the body of the child from his house to a yard in the neighbourhood, and that the stench arising from it amounted to a nuisance.

" I told the jury that the defendant was bound to provide for the burial of his deceased child, if he could in any lawful way procure the means for so doing, and as the Guardians were entitled, under the order of the Poor Law Commissioners, to give relief for the purposes of burial by way of loan, and as the defendant had been offered such relief in that manner, he was bound to receive it, and consequently he was not excused from the liability to provide for the interment of his deceased child, and was liable to be convicted upon the indictment for nuisance, if the jury believed the facts.

" The jury found the defendant guilty.

" I reserved a case for the opinion of the Court of Criminal Appeal, whether the defendant, by refusing to incur the obligation of a debt, rendered himself, as a consequence of that refusal, liable to prosecution for the above misde-

1851. “ The judgment upon the conviction was postponed, and
REG. v. VANN. the defendant was discharged on recognizance of bail, to
appear and receive judgment at the sessions next after this
case should be heard and decided.

“ (Signed) J. HILDYARD,
“ Recorder.

“ 7th November, 1851.”

O'Brien, for the Crown.—A man is equally bound to bury the body of his child after its death as to support it when living. He could not justify his not supporting the child upon the ground that he could not obtain bread except upon credit. Suppose a man to be absent from home and his child to be left without the means of subsistence, and another person to supply the child with food, such person would have a right of action against the father in respect of such supply. So if another person had buried this child, he might have maintained an action against the father for the reasonable expenses: *Ambrose v. Kerrison* (a). [*Lord Campbell*, C. J.—Is a man guilty of a crime who omits to do that he has not the means of doing?] No; but here he had the means: he had the ability to do the act.

LORD CAMPBELL, C. J.—We are clearly of opinion, upon the question left to us, that this conviction is unwarranted, and that the direction of the Chairman to the jury cannot be supported: he told them “that the defendant was bound to provide for the burial of his child if he could,” so far he is right; but he went on to say, that as the Guardians were entitled under the order of the Poor Law Commissioners to give relief for the purposes of burial, by way of loan, and as the defendant had been offered such relief he was bound to receive it, and consequently he was

(a) 20 L. J., C. P. 135.

not excused from the liability to provide for the interment of his deceased child, and was liable to be convicted upon the indictment, if the jury believed the facts. He lays down in point of law that the jury were, upon belief of the facts, bound to convict the defendant. There is no doubt, if a man has the means of giving his child christian burial, he is bound to do so ; but he is not liable to be indicted for a nuisance for not burying it if he has not the means. Unless he has the means of giving the child christian burial, he does not commit a nuisance by the child remaining unburied, although it might be a nuisance to the neighbourhood, for which the parish officer would probably be liable. Here it is laid down that the defendant was bound to accept a loan payable on demand, and to render himself liable to be proceeded against and detained in prison, and to lose his liberty and the means of maintaining his family. The law has no such application. The case put, if applicable, would go to show that a person would be liable to be indicted for not burying his child, even if he had not the means or the possibility of raising them. This conviction cannot be supported.

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REG. v. VANN.

Conviction quashed.

1851.

*Saturday,
November 22.***THE QUEEN *against* SAMUEL AMOS WORTLEY.**

The prisoner agreed with the prosecutor to take the charge of land, &c., at a fixed salary and one-third of the profits. Held, to create the relation of servant and not of partner—that the prisoner was a labourer, and the agreement therefore within the exception in the Stamp Act.

The prisoner, upon accounting with the prosecutor's wife, denied the receipt of moneys paid to him. Held, an embezzlement.

“THE prisoner, Samuel Amos Wortley, was tried at the Quarter Sessions for the county of Somerset, held at Taunton, on the 14th day of October, 1851, before me as Chairman, on an indictment which charged that he, being a servant to the Rev. Joseph Butterworth Bulmer Clarke, on the 26th day of September, in the year of our Lord 1851, did feloniously embezzle two several sums of money, one of 28*l.* 12*s.*, and the other of 18*l.* 11*s.*, the property of his said master.

“It appeared at the trial, that the prisoner, on the 12th of March, 1850, entered into the following agreement with the prosecutor, which being duly proved, was tendered in evidence.

“It was unstamped.

“ ‘Samuel Wortley engages to take charge of the glebe land of the Rev. J. B. Clarke, his wife undertaking the dairy and poultry, &c., at 15*s.* a week till Michaelmas, 1850, and afterwards at a salary of 25*l.* a year and a third of the clear annual profit after all expenses of rent, rate, labour, and interest on capital, &c. are paid, on a fair valuation from Michaelmas to Michaelmas. Three months' notice on either side to be given: at the expiration of which time the cottage to be vacated by Samuel Wortley, who occupies it as bailiff in addition to his salary. March 12th, 1850.

“ ‘J. B. B. CLARKE,

“ ‘S. A. WORTLEY.’

“The prisoner's Counsel objected to its reception in

evidence, on the ground that it required a stamp either as a contract for a partnership, or as an agreement not within the exemption in the Stamp Act.

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WORTLEY.

“ The objection was overruled, and the document admitted as evidence. It was proved that the prosecutor was the owner of a farm consisting of certain glebe lands, and that, on the 12th of March, 1850, the prisoner entered into the management of them on the terms of the said agreement, and that he continued to manage them on the same terms up to the 4th October, 1851, when he absconded. He had been instructed to account for all sums received, and did so account at certain stated periods with the wife of the prosecutor, except as hereinafter mentioned. The stock, crops, &c., on the farm, were purchased with the money of the prosecutor, the prisoner not contributing to the capital employed in carrying on the business. In the course of the business, on the days specified in the indictment, he received the two several sums in the indictment mentioned for a portion of a quantity of wheat which the prisoner had purchased by public auction in the course of his management of the business, in a growing state, and afterwards cut and threshed ; and which standing wheat, so purchased by the prisoner, was paid for by a bill of exchange, drawn by the auctioneer upon, and accepted by the son of the prosecutor on the prosecutor's behalf. And the prisoner having, on his accounting subsequently with the prosecutor's wife, denied the receipt of such two sums, and applied them to his own use.

“ At the close of the case, it was objected that the prisoner did not stand in relation of servant, but of partner to the prosecutor ; and, at all events, that the prosecutor had no right to call on the prisoner to account till Michaelmas 1851, when the respective shares, rights, and interests of the prosecutor and prisoner in the profits and

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WORTLEY.

property was to be ascertained, and that, therefore, the indictment failed.

“The Court overruled the objections, directing the jury that the agreement created the relation of master and servant between the prisoner and prosecutor, and not that of partner; and that the prisoner’s denial of the receipt, although there had been no valuation of the property or the profits ascertained, was sufficient to constitute the offence charged.

“The jury convicted the prisoner.

“The Court respited the judgment, and remanded the prisoner to the next sessions, reserving for the opinion of the Justices of either bench, and of the Barons of the Exchequer, the two following questions:—

“1st. Whether the agreement was properly received in evidence without a stamp?

“2nd. Whether the direction to the jury that the agreement created the relation of master and servant, and not that of partner, was correct. And, Whether the denial of the receipt by the prisoner under the circumstances, constituted the crime of embezzlement as charged in the indictment.

“The foregoing is the case upon which the opinion of the said Justices and Barons is requested accordingly.

“(Signed) WILLIAM MILES,

“Chairman of the Quarter Sessions for the
County of Somerset.”

Phinn, for the Crown.—This being a matter between the Crown and a subject, the question of the stamp was not material (*a*). At the trial it was contended that it was a partnership, inasmuch as the prisoner participated in the profit

(*a*) Ros. Cr. Ev. 211, 3rd ed.

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WORTLEY.

and loss; but it really was a contract for service, giving the prisoner an inducement to devote his best attention to his employer's interest; and not a partnership: *Dry v. Boswell* (a). That case had been much questioned by Mr. Justice Story, but upon grounds which were not material here, as the present case was not between third parties, but was *inter se*. It was not here to be considered whether the prosecutor and the prisoner were partners as to third persons, but whether they were partners *inter se*? He, however, contended that this was not a contract of partnership, but for service: *Muir v. Glennie* (b). In *Rex v. Hartley* (c), it was held that a person who was employed as the master of a barge to carry out and sell coals, and who was allowed a per-centage upon the sale, was a servant, and not a partner. There were many other cases on this subject collected in Story on Partnership (d). If he was a servant, then a menial servant, and was within the exception in the Stamp Act (e). The word menial is said to be derived from *mœnia*, and to mean servants living within their master's walls, and under their master's roof; but this was extended by Lord Abinger in *Wilson v. Zulueta* (f), where a stoker was held to be a menial servant. He also referred to *Rowland v. Abbott* (g), *Johnson v. Blenkinsopp* (h). If the Court should be of opinion that he was not a menial servant, he should contend that he was, at any rate, a labourer, and therefore coming within the exception in the Stamp Act. Besides, the document was not put in for the purpose of proving a contract, but to prove a crime committed. The authorities may be all found collected in *Rex v. Gilson* (i). If the Court should be of opinion that

(a) 1 Camp. 329.

(b) 4 M. & S. 240.

(c) Rus. & Ry. 139.

(d) P. 62 *et seq.*; the result of them, p. 74.

(e) 23 Geo. III. c. 58.

(f) 19 L. J., Q. B. 49.

(g) 2 Cr. M. & R. 54.

(h) 5 Jur. 870.

(i) Rus. & Ry. 138.

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the case was within the exception, he would not trouble them upon the general question upon the Stamp Act.

LORD CAMPBELL, C. J.—I am of opinion that the prisoner was a labourer ; that the document comes within the exception in the Stamp Act (*a*), and was properly admitted. I am also of opinion that there was not the relation of partners, and, therefore, that the direction to the jury was correct. As to the third question, there are plenty of authorities to show that this denial of the receipt of the money was an embezzlement.

ALDERSON, B., PLATT, B., TALFOURD, J., and MARTIN, B., concurred.

Conviction affirmed.

(*a*) 23 Geo. III. c. 58.

THE QUEEN *against* MICHAEL PRESTON.

LARCENY.

1851.

Saturday,
November 22.

"MICHAEL PRESTON was tried before me at the last Michaelmas Sessions (1851) for the Borough of Birmingham, upon an indictment which charged him in the first count with stealing, and in the second with feloniously receiving a 50*l.* note of the Bank of England. It was proved that the prosecutor, Mr. Collis, of Birmingham, received the note in question, with others, on Saturday, October the 18th, from Mr. Ledsam, who before he handed it to the prosecutor wrote on the back of it "Mr. Collis."

"It was further proved that Collis was a very unusual surname in Birmingham, and almost, if not quite, confined to the family of the prosecutor, a well-known master-manufacturer. About four o'clock the same afternoon, the prosecutor accidentally dropped the notes in one of the public streets in Birmingham, and immediately gave information of his loss to the police, and also caused hand-bills, offering a reward for their recovery, to be printed and circulated about the town. On Monday, the 20th, about three o'clock in the afternoon, the prisoner, who had been living in Birmingham fourteen years, and keeping a shop there, went to one of the police stations and inquired of a policeman if there was not a reward publicly offered for some notes that had been lost, and whether their numbers were known, stating that he was as likely as any person to have them offered to him, and if he heard anything of them he could let the police know. He also inquired if the policeman could give him a description of the person who was supposed to have found them, and the policeman gave him a description of such a person, who was described

The prisoner had in his possession a note which had been lost for two days. Upon the trial of the prisoner for felony, the jury were directed, that if they were of opinion that at the time when the prisoner first resolved to appropriate it to his own use he knew the owner, or believed that he could be found, they were to find him guilty. Held, an erroneous direction, as it was possible that the prisoner might for some time have had honest possession of the note, in which case a subsequent conversion would not amount to larceny.

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therein as a tall man. Afterwards, between three and four o'clock the same afternoon, the prisoner went to the shop of Mr. Bickley, in Birmingham, and after inquiring if he, Bickley, had heard of the loss of a 50*l.* note, stated that he, the prisoner, thought he knew parties who had found one, and then asked Bickley whether the finders would be justified in appropriating it to their own use, upon which Bickley replied that they would not. About four o'clock in the same afternoon the prisoner changed the note, and was later in the same evening found in possession of a considerable quantity of gold, with regard to which he gave several false and inconsistent accounts. He was then taken into custody. On the following day, the 21st October, he stated to a constable that when he was alone in his house on Sunday a tall man whom he did not know came and offered him a 50*l.* note, for which he, the prisoner, gave him fifty sovereigns. The police officer had previously told the prisoner that they were in possession of information that one Tay, who was known to the prisoner, had found the note, but Tay was not called, nor was any evidence given as to the part, if any, which he took in the transaction.

“ Upon these facts I directed the jury that the important question for them to consider was at what time the prisoner first resolved to appropriate the note to his own use. If they arrived at the conclusion that the prisoner either knew the owner, or reasonably believed that the owner could be found at the time when he first resolved to appropriate it to his own use, then he was guilty of larceny ; if, on the other hand, he had formed the resolution of appropriating it to his own use before he knew the owner, or had a reasonable belief that the owner could be found, then he was not guilty of larceny. I also told the jury that there was no evidence of any other person having possession of the note after it was lost, except the prisoner ; but that even though the prisoner might not be the original finder, still,

if he were the first person who acted dishonestly with regard to it, and if he began to act dishonestly by forming the resolution to keep it for his own use after he knew the owner, or reasonably believed that the owner could be found, he would be guilty of larceny. The jury found the prisoner guilty upon the first count, and I request the opinion of the Judges as to the validity of the conviction. The prisoner was discharged upon the recognizances of himself and his sureties to appear and receive judgment at the next session."

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O'Brien, for the prisoner.—The finding of the jury did not amount to larceny. The jury found that the prisoner knew the owner at the time when he first resolved to appropriate the note to his own use. That is not larceny according to any view of the case. In all the cases of finding in order to constitute larceny, there must be three things. There must be an act amounting to taking into possession, and, coincident in point of time, there must be a knowledge of the owner, and the *animus furandi*. By "knowledge" must be understood knowledge or reasonable belief. He cited *Rex v. Leigh* (a), *Rex v. Mucklow* (b), *Reg. v. Thurborn* (c), *Merry v. Green* (d). In this case all that the jury have found is, that the prisoner, when he formed an intention of appropriating it, had the means of knowing the owner. It is not found that at the time he picked it up he had the *animus furandi*: there may have been an honest possession, and a subsequent *animus furandi*. In that case it would not be a larceny. [*Alderson*, B.—How can it be that, if he was the first person who acted dishonestly with regard to it, he was guilty of larceny? He may have given the fifty sovereigns for it, and as the verdict is general we cannot tell that he was not found guilty upon that point.

(a) 2 East, P. C. 694.

(b) 1 Moo. C. C. 160.

(c) 18 L. J., M. C. 140; *ante*. p. 67, S. C.

(d) 7 M. & W. 623.

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Lord Campbell, C. J.—It is consistent with this that the prisoner might have received it honestly, and at first have determined to keep it for the owner, but afterwards was tempted to appropriate it to his own use.] It is also consistent with the finding that he might at the first have intended to restore it, but finding it belonged to a rich man he kept it, in the hope that a reward would be offered for it. There must be a felonious taking, or it cannot afterwards be made a felony.

Bittlestone, for the Crown.—The Court will look to the direction of the Judge with reference to the facts as they were proved at the trial. [*Alderson, B.*—The case is not so submitted to us. *Lord Campbell, C. J.*—Do you contend that if the prisoner once had the note honestly in his possession he might afterwards be guilty of larceny?] He apprehended it was not necessary for him to contend that. The first possession is not confined to the time of the mere act of taking up, there must be also a reasonable time for the examination. [*Lord Campbell, C. J.*—The jury were directed to consider at what time the prisoner first resolved to appropriate the note to his own use, and that if *at that time* the prisoner knew or believed that the owner could be found, he was guilty of larceny. *Alderson, B.*—It may have been a day or two after he obtained the note that he received an intimation of the owner; upon that supposition when was the taking?] When the true owner is discovered the prisoner may then be said in law to take it. Upon first finding it the prisoner might not intend to appropriate it to his own use, but if he afterwards determined to do so, his doing so would be a conversion. [*Alderson, B.*—With what intention he first took the note was not left to the jury.] The governing question is—at what time does he intend to exercise complete dominion over it? He submitted that there was no possession in the prisoner as adverse to that of the owner, until the time when the prisoner resolved to appropriate it to his own use. There was a

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wide distinction between those cases where there was no mark upon the note by which the owner might be discovered and other cases when there was such a mark : *Reg. v. Thurborn* (a), *Merry v. Green* (b). [*Alderson*, B.—When a man has discovered what he has found, then comes the deciding point—what will he do?] The prisoner then has a possession by the finding, as against all the world except the owner (*Armory v. Delamirie* (c)); but directly the owner is discovered the right to possession is in him, and as against him the finder has a mere custody, and if upon discovering the owner the finder determines to appropriate the property found to his own use, it immediately becomes a taking out of the possession of the real owner, *animo furandi*. [*Martin*, B.—Suppose the case of a man losing his umbrella, another finds it and keeps possession of it for two or three days, and then, discovering the owner's name upon it, says—"Well, I lost mine, and I shall keep this until I get mine back;" would that be larceny?] Upon the authority of *Merry v. Green* that would be larceny. [*Lord Campbell*, C. J.—In order to support this ruling you must show that there can be a mere mental larceny.] The appropriation may be the mere act of the mind, to be decided by the jury upon evidence, as in the case of an intent. [*Lord Campbell*, C. J.—There might be evidence to go to the jury of the *animus furandi*, by reason of a subsequent appropriation; but here the Recorder says that he may have come by it honestly, and if the *animus furandi* came upon him afterwards that would be larceny. *Alderson*, B.—This principle is involved in a bailment when a man breaks bulk; the fact of his breaking bulk is taken as a resolution of his own mind to appropriate the goods to his own use.]

LORD CAMPBELL, C. J.—I am of opinion that this con-

(a) *Ante*, p. 67. (b) 7 M. & W. 631, *per Parke*, B. (c) 1 Sm. L. C. 151.

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viction cannot be supported. Larceny supposes a taking *animo furandi*; there must be a taking. There is something technical in that, but it is still a definition from which we cannot depart. In this case the direction to the jury supposes there may be larceny, although there is an honest possession on the part of the finder, because he says—"the question is, at what time the prisoner first resolved to appropriate the note to his own use?"—that might have been long after he was in possession with a full knowledge of its nature, and under circumstances showing that he had not taken it *animo furandi*. When was the taking? It is supposed what passed in his own mind is the taking, although no act is done. I do not think there can be a taking where nothing is done, except what might be done by a person when lying in his bed at a long distance from the article alleged to be taken. We need not enter into the case of *Reg. v. Thurborn*. I think, consistently with that decision, we are called on to determine that this direction cannot be supported.

ALDERSON, B.—I cannot see how an honest taking is to become a felony afterwards. Here the taking may have been perfectly honest, and the keeping possession also, up to a given time. It is said that the alteration of the mind converts the honest taking into a dishonest taking. That is such a construction as would destroy the simplicity of the law. You cannot make a determination of the mind an act of felony.

PLATT, B., TALFOURD, J., and MARTIN, B., concurred.

Conviction quashed.

CENTRAL CRIMINAL COURT.

IN

THE FIFTEENTH YEAR OF THE REIGN OF VICTORIA.

CORAM

WILLIAMS, J.

THE QUEEN *against* GERBER, WAGNER, KESSLER, and
KRAKOUER.

1852.

Thursday,
February 26.

ALL the prisoners had pleaded Not Guilty, and when they were placed in the dock to take their trial, *Clarkson*, for the prosecution, obtained leave from the Court to try the three first-named prisoners without Krakouer, upon a statement that in his opinion such a course would further the ends of justice. Krakouer was accordingly ordered from the dock. He was subsequently called as a witness and examined upon the *voir dire*, when he admitted that he was jointly indicted with the other prisoners. *Parry* and *Dearsley*, on behalf of two of the prisoners, objected that his evidence was inadmissible, he being, in fact, a party to the record. The practice before the grand jury was also referred to (a).

A., B., C. and D. were indicted together. After plea, and before they were given in charge to the jury, the Court allowed D. to be removed from the dock and examined as a witness against his associates.

WILLIAMS, J.—The jury have not in this case been charged with the prisoner Krakouer. The application on the part of the Crown has been granted. The parties are

(a) See Haw. P. C. bk. 2, c. 25, s. 2.

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tried separately. Krakouer is not upon his trial, and therefore no objection that his evidence is inadmissible can prevail. The practice of not admitting one prisoner as a witness upon the trial of another prisoner indicted with him for the same offence is perhaps founded upon the inconvenience that would result if the party called as a witness was, at the time, actually upon his trial. That the witness, under the present circumstances, is admissible, has been settled for more than a century (*a*). There is no valid objection to his competency, and he must be admitted.

Krakouer, who had been ordered out of Court, was then called, and gave his evidence.

(*a*) See 1 Hale, 305; *Rex v. Ellis*, Macnall, 53, and *Lee v. Gansell*, 1 Cowp. 3; Com. Dig., Testmoign, Witness, A, 3; Haw. P. C. bk. 2, c. 46, ss. 90 *et seq.*; *Qy.*, may be evidence on behalf of associate, 2 Hale, P. C. 280; Haw. P. C. bk. 2, c. 46, ss. 94 *et seq.*

AN INDEX TO THE PRINCIPAL MATTERS.

ABANDONING CHILD.

A mother is not indictable for abandoning her *bastard child* without having provided for its support, unless some consequential injury arise to the child. It is not sufficient that she intended to cast upon a parish the burden of supporting the child. *Reg. v. Hogan*, 601

And see PLEADING, 3—8.

AMENDMENT.

Semble, the Court will not (except, perhaps, under extreme circumstances) send back a case for amendment under the 11 & 12 Vict. c. 78, s. 4. *Reg. v. Holloway*, 40

And see POINTS OF PRACTICE.

ARREST OF JUDGMENT.

See STATUTE, 2 ; PRACTICE, 6.

ARSON.

A. (formerly in the army) was in the habit of employing his capital in building houses upon his own land for his profit and gain. He had erected a closed-in and boarded build-

ing, twenty-four feet square, with slated roof and glass windows ; it was called "the workshop," and was used as a place of deposit for tools and building materials. Held, that this was a "*shed*" within the meaning of the statute 7 Will. IV. & 1 Vict. c. 89, s. 3. *Reg. v. Amos*, 422

Quære, A "warehouse," an "office," a "shop," a "building used for carrying on a certain trade ;" i. e. "the trade of a builder." *Ib.*

ASSAULT.

1. The prisoner was indicted for a felonious assault and robbery. Held, that he could not be convicted of assaulting *with intent to rob*. *Reg. v. Reid*, 431

2. Two prisoners were indicted for murder. The jury negatived that the assaults, or any one or more of them laid and proved against the prisoners, or either of them, conduced to the death. Held, that the prisoners could not upon that indictment be convicted of an assault, under 1 Vict. c. 85, s. 11. *Reg. v. Bird*, 487

That therefore, upon a subsequent indictment for the same assaults, [as

assaults,] the prisoners could not plead *autrefois acquit*. *Ib.*

3. Some boys had connexion with a girl, nine years of age. The jury found them "guilty, the girl assenting, but that from her tender years she did not know what she was about." Held, that they could not be found guilty of an assault. *Reg. v. Read*, 52

4. Where a medical man had connexion with a girl, fourteen years of age, under pretence that he was treating her medically; and the jury found that at the time the girl was ignorant of the nature of the act, and that, confiding in him, she offered no resistance, but did not consent, it was held, that he was properly convicted of an assault. *Reg. v. Case*, 318

The question of fraud or no fraud, as the means of obtaining a consent in such a case, need not be specifically left to the jury for them to find as a fact; it is sufficient if the case is so left to them that fraud in law, or no fraud, must be assumed from their verdict upon the case as left to them. *Ib.*

It would not be proper to leave it to the jury to say whether the act was done with a view to cure the girl of an illness from which she was suffering; because, such an act could not be so justified. *Ib.*

A consent obtained by fraud is equivalent to no consent. *Ib.*

On an indictment for an assault the prisoner may be convicted, although upon the evidence the offence should amount to a rape. *Ib.*

Semble, consent or no consent may depend upon the age of the party, regard being had to the probability of her being deceived as to the nature of the act. *Ib.*

BAILEE.

See LARCENY, 8, 9; SERVANT.

BANKRUPT.

See PLEADING, 6.

BASE COIN.

See EVIDENCE, 11.

BASTARDY, ORDER IN.

Where justices in petty session have made an order in bastardy which is bad upon the face of it, and which has been in no way enforced, and the costs actually incurred by the putative father have been tendered to him, such order may be simply abandoned, and a new one made by the same or by other justices. *Reg. v. Brisby*, 109

BASTARD CHILD.

Deserting bastard child. See PLEADING, 3.

BURLAL.

See NUISANCE.

CHURCH RATES.

Justices of the peace, in issuing a warrant under the stat. 53 Geo. III. c. 127, s. 7, to levy a church rate by distress and sale, must pursue the terms of the stat. 27 Geo. II. c. 20, by limiting the sale (except in the case of a Quaker) to not less than four nor more than eight days from the time of the seizure. *Reg. v. Williams*, 235

A warrant to levy "forthwith" (upon a person not a Quaker) is therefore bad. *Ib.*

COLLECTOR OF POOR'S RATES.

See SERVANT.

CONFESSION.

See EVIDENCE, 4.

CONSPIRACY TO PROCURE DEFILEMENT.

A conspiracy to induce a young woman to submit her body to defilement is an indictable offence. *Reg. v. Mears*, 414

CORRUPT RECEIVING OF MONEY, WITHIN 7 & 8 GEO. IV. c. 29, s. 58.

The prosecutrix had had her house broken open, and several cheeses stolen. The prisoner called upon her, and told her he suspected who were the parties. He received from the prosecutrix 3*l.* to purchase part of the cheese. The jury found, "That the prisoner knew the thieves, and assisted the prosecutrix as her agent, and at her request, in endeavouring to purchase the stolen property from them, not meaning to bring the thieves to justice." Held, that the receipt of the money by the prisoner was a corrupt receiving of such money, within the meaning of 7 & 8 Geo. IV. c. 29, s. 58. *Reg. v. Pascoe*, 141

COUNTERFEIT COIN.

See EVIDENCE, 11.

COUNTING-HOUSE.

A building, part of the premises of a factory, was called the "Machine-house." In this place all goods sent out were weighed and entered in a book kept there. Other books, usu-

ally kept in another building called the "Office," were used there for the purpose of taking the men's time and paying them their wages. Held, that this was a counting-house within the meaning of statute 7 & 8 Geo. IV. c. 29, s. 15. *Reg. v. Potter*, 561

DEPOSITIONS.

1. A witness was examined before the magistrate, in the presence of the prisoner. The clerk to the magistrate afterwards, at his own office—the magistrate and the prisoner being absent—in drawing up the depositions put further questions to the witness, and inserted the answers. This statement was afterwards read before the magistrate in the presence of the witness and the prisoner, and the witness resworn as to its truth. Held, that the witness at the trial might be asked as to such answers without putting in the written document. *Reg. v. Christopher*, 225

Quære, whether such a document is in law a deposition. *Ib.*

2. There is no authority requiring any title, or as it is called caption, to an examination; it is sufficient if it be described as the examination of the witness, and that the evidence referred to the charge upon which the prisoner may be upon his trial. *Reg. v. Langbridge*, 146

3. The deposition of a witness absent from illness may be used before the grand jury. *Reg. v. Clements*, 579

Quære, can objection be taken to any proceeding before the grand jury? *Ib.*

Putting in Evidence. See EVIDENCE, 6—8; PRACTICE, 8.

EMBEZZLEMENT.

1. The prisoner agreed with the prosecutor to take the charge of land,

&c., at a fixed salary and one-third of the profits. Held, to create the relation of servant and not of partner; that the prisoner was a labourer, and the agreement therefore within the exception in the Stamp Act. *Reg. v. Wortley*, 636

The prisoner, upon accounting with the prosecutor's wife, denied the receipt of moneys paid to him. Held, an embezzlement. *Ib.*

2. Where money had been received by A. a servant, on account of his master, and by him paid over to B., a fellow servant, whose duty it was to pay it over again to C., the cashier in the same employment, and B. fraudulently retained such money, it was held to be an embezzlement within 7 & 8 Geo. IV. c. 29, s. 47. *Reg. v. Masters*, 1

See LARCENY, 7—11.

Uncertainty as to the county in which the money was abstracted. See SERVANT; VENUE, 1.

ERROR, WRIT OF.

See POINTS OF PRACTICE; PRACTICE.

EVIDENCE.

1. Where evidence of a confession was received, which upon further examination it appeared should have been excluded, but which was nevertheless submitted to the jury on the ground that they could not divest their minds of the effects produced by the admission, and the prisoner was convicted, such conviction was reversed. *Reg. v. Garner*, 7

2. Neither upon an indictment for stealing, nor receiving, can evidence be given that the prisoner had, at the time or previously, other stolen goods in his possession. *Reg. v. Oddy*, 593

3. The words, "it would be better for you to tell the truth," addressed to a girl thirteen years of age, by a medical man attending upon a person whom the girl is suspected of having poisoned, are sufficient to exclude evidence of a confession by the girl consequent upon the use of them. *Reg. v. Garner*, 7

4. Upon a charge of obtaining, under false pretences, a promissory note and other valuable securities, it is no objection to receiving a deposition in evidence that the caption of the deposition does not state that the money was obtained illegally. *Reg. v. Langbridge*, 146

5. A prisoner cannot be convicted upon an indictment charging a larceny of specific coins, unless there is evidence from which the jury may find that some one of the particular coins charged was the subject of the larceny: it is not sufficient that the evidence satisfies the jury that some of one or of the other coin mentioned was stolen. *Reg. v. Bond*, 242

6. A statement made by a prisoner before a magistrate, not signed either by the magistrate or the prisoner, is not excluded as evidence because the magistrate omits to inform him that he has nothing to hope or to fear from either promise or threat. *Ib.*

7. A prisoner admits having bought an article, which is subsequently found in his house. That is sufficient evidence for a jury to convict of receiving, without proof of an actual receipt, or that he had ever been at the house from before the purchase to the time of the charge. *Reg. v. Matthews*, 337

8. A statement made by a prisoner before a magistrate, and signed by the magistrate and the prisoner, is ad-

missible as evidence against the prisoner upon his trial, although the magistrate omits to inform him (as in 11 & 12 Vict. c. 42,) that he has nothing to hope from any promise, and nothing to fear from any threat which may have been made or held out to him. *Reg. v. Sansome*, 260

9. On an indictment for forgery, at common law, it is not necessary to prove that the party charged was in custody before the time of the trial, in order to give jurisdiction under the statute 11 Geo. IV. & 1 Will. IV. c. 66, s. 24. It will sufficiently appear by the caption. *Reg. v. Smithies*, 190

10. An indictment charging an attempt to obtain goods from A., and others, (partners in trade,) by false pretences made to A. and others, is supported by proof of false pretences to A. alone. *Reg. v. Kealey*, 404

11. An indictment for "uttering and putting off" counterfeit coin is satisfied by evidence of a tender of the coin. *Reg. v. Welsh*, 409

12. Two persons stole some fowls, and carried them in a sack, at half-past four o'clock, A.M. to the house of A.'s father. A. (a higgler) admitted the thieves into the house, and shortly afterwards carried a lighted candle and conducted them to a stable (at the back of the house and belonging thereto), where one of the thieves who had carried the sack placed it on the floor. The mouth of the sack was tied. There was evidence that the three stood round the sack as if bargaining. Held, that upon these facts A. could not be convicted of receiving. *Reg. v. Wiley*, 367

13. When a lunatic is tendered as a witness, it is for the judge to determine whether he shall be admitted.

If, upon his examination upon the

voir dire, he exhibits a knowledge of the religious nature of an oath, it is a ground for his admission.

Semble, such a witness cannot be objected to, after examination in chief, on the ground that he is *non compos mentis*. *Reg. v. Hill*, 582

14. Neither upon an indictment for stealing, nor receiving, can evidence be given that the prisoner had, at the time or previously, other stolen goods in his possession. *Reg. v. Oddy*, 593

15. An accomplice indicted with others may, by leave of the Court, after they have all pleaded and before the jury have been charged, be withdrawn from the dock and examined as a witness for the prosecution. *Reg. v. Gerber and others*, 647

16. Night poaching, under 9 Geo. IV. c. 69. See NIGHT POACHING.

17. Verbal evidence withdrawn after having been tendered. See PERJURY, 2, 4.

18. Evidence of venue in embezzlement. See VENUE, 1.

19. Caption. See DEPOSITIONS, 1, 2.

20. Examining witnesses on depositions. See PRACTICE, 8.

See PREVIOUS CONVICTION, 1.

FALSE PRETENCES.

1. Obtaining a gift of money by means of false statements, is obtaining money by false pretences within the meaning of the statute 7 & 8 Geo. IV. c. 20, s. 53. *Reg. v. Jones*, 270

2. A secretary of a friendly society obtaining money from one of the members under pretence that it was owing, when in fact no money was owing, is guilty of a "false pretence," within the meaning of the statute 7 & 8 Geo. IV. c. 29, s. 53. *Reg. v. Wooley*, 279

It is not the less a false pretence within the statute, because the party imposed upon might by common prudence have avoided the imposition. *Ib.*

3. A servant had authority from his employers to pay money on their behalf, and to demand repayment from their chief clerk. He falsely pretended to have paid a certain sum, and demanded repayment from the clerk. The clerk paid him the money. Held, false pretences, and not larceny. *Reg. v. Barnes*, 387

Omitting in an indictment for false pretences to state the false pretence. See PLEADING.

Statement of false pretence to A. and B., supported by evidence of false pretence to A. alone. See EVIDENCE, 10.

FORGERY.

1. An instrument in the following form, "Permit Self and Co. to taste wine, ex Traveller," &c., directed to the cooper at a particular vault in the London Docks, and purporting to be signed by the owner of wine in that vault, is an order for the delivery of wine: although the cooper, by the Dock regulations, could not act upon it until countersigned by a clerk of the company. *Reg. v. Illidge*, 127

2. To forge a certificate of service, sobriety, and good conduct at sea, with intent to deceive and defraud, &c., is an offence indictable at common law. *Reg. v. Toshack*, 207

3. A bill of parcels underwritten, "I hope you will excuse me for sending for such a trifle," &c., and purporting to be signed by the party to whom the money was due, and presented to the debtor, is a "warrant," and (*semble*) also an "order" within the meaning of the statute 11 Geo. IV. & 1 Will. IV. c. 66, s. 3. *Reg. v. Dawson*, 428

4. The prisoner was convicted upon an indictment for uttering a certain forged warrant, order, *and* request, &c. In the indictment the instrument was set out verbatim. It was contended that the instrument was neither a warrant nor an order. Held (without deciding the point argued) that the instrument, having been set out upon the indictment, the prisoner was properly convicted. *Reg. v. Williams*, 382

5. Evidence of jurisdiction in forgery under stat. 11 Geo. IV. & 1 Will. IV. c. 66, s. 23. See EVIDENCE, 9.

GOODS AND CHATTELS.

1. A railway pass-ticket is a chattel (and of value) within the statute 7 & 8 Geo. IV. c. 29, s. 53. *Reg. v. Boulton*, 201

2. Coin described as goods and chattels. See PLEADING, 4.

GRAND JURY.

Putting depositions in evidence before grand jury. See DEPOSITIONS, 3.

HUSBAND AND WIFE.

Cannot be together convicted of receiving. See RECEIVING, 2.

IDEM SONANS.

A prisoner was indicted for receiving, &c., the goods of *Darius C.* The prosecutor said in evidence that his name was *Trius C.* Held, that the question of *idem sonans* was for the jury. *Reg. v. Davis*, 557

INDECENT EXPOSURE.

An indecent exposure to one person is not an offence indictable at common law.

Seemle, aliter, when it is so done that other persons might have seen. *Reg. v. Webb*, 23

INFANT.

1. Deserting infant of tender years. See PLEADING, 3, 8.

2. A mother is not indictable for abandoning her *bastard child* without having provided for its support, unless some consequential injury arise to the child. It is not sufficient that she intended to cast upon the parish the burden of supporting the child. *Reg. v. Hogan*, 601

JURY.

1. A foreign woman married to a British subject is, by virtue of stat. 7 & 8 Vict. c. 66, s. 16, deprived of her right to a jury *de medietate lingue*. *Reg. v. Manning*, 155

2. A prisoner was indicted for a felony after a previous conviction; the jury found him guilty of the felony, and were about to be re-sworn to inquire as to the previous conviction. Held, that the prisoner was not then entitled to a challenge. *Reg. v. Key*, 623

LARCENY.

1. The prosecutor sent a mare to the prisoner for sale, and after some time made two several applications to have her returned. The prisoner promised to ride the mare to Plymouth for the prosecutor, he did so, and put the mare up at a stable and paid for her bait. Whilst the mare was there, the prosecutor refused to let the prisoner take the mare to a place he desired to send her to, and sent a boy who went with orders to the ostler at the stable not to let the prisoner have the mare again. The prosecutor then told the prisoner "never to put finger near the mare again," to which the prisoner answer-

ed "Well." The prisoner afterwards applied to the ostler for the mare, and obtained her by means of a false statement. Held, that the prisoner was rightly convicted of larceny. *Reg. v. Stear*, 11

2. A, a servant to a tallow-chandler, clandestinely removed some of his master's fat from one place to another, and then, in conjunction with B., endeavoured to sell it to his master as the property of B. and C. Held, that A. was rightly convicted of larceny. *Reg. v. Hall*, 47

3. In a tannery, certain skins had been dressed, the wages for dressing paid, and the skins deposited in a warehouse. The prisoner afterwards clandestinely removed those skins and carried them away, "with intent to deliver them to the foreman, and get paid for them as if they were his own work." Held, not a larceny.

To constitute larceny there must be an intention, without any colour of right, to deprive the owner of the entire property. *Reg. v. Holloway*, 40

4. The act of secreting a letter by a person employed in the post-office, coupled with an intention to deprive the owner of the property, is a larceny. *Reg. v. Wynn*, 32

5. A special verdict, "Not guilty of stealing the watch, but guilty of keeping possession of it, in the hope of reward, from the time he first had the watch," is an acquittal, upon a charge of larceny. *Reg. v. York*, 21

6. The prisoner found a bank-note in the high road; at that time, he had no means of discovering the owner, nor any reason to believe that the owner knew where to find it; he picked it up, intending to appropriate it to his own use; the next day he was informed who was the owner; he afterwards did appropriate it to his own use. Held, that he was not guilty of larceny.

In order to constitute the crime of larceny, there must be (at least) a taking of the chattels of another *animo furandi*, and against the will of the owner.

By *animus furandi* is to be understood the intention not to take a partial or temporary, but the entire dominion over the chattels, without a colour of right.

The crime of larceny cannot be committed unless the goods taken appear to have an owner, and the party taking must know or believe that the taking was against the will of that owner.

A person who finds goods which are lost may convert them *animo furandi* under some circumstances, so as not to be guilty of larceny—as in the taking of waif and treasure-trove, which are really goods without an owner, the taker would not be guilty of larceny, though he took originally *animo furandi*: so, when a person finds a purse in the highway, and takes it *animo furandi*, not being presumed to know the owner, nor having at the time the means of discovering him, it is not felony.

To prevent the taking of goods from being larceny, it is essential that they should be taken under such circumstances as that the owner would be reasonably presumed by the taker to have abandoned them, or, at least, not to know where to find them. If a man, therefore, finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them *animo furandi*, really believing when he takes them that the owner *cannot* be found, it is not larceny; but, if he really believes that the owner *can* be found, it is larceny. *Reg. v. Thurborn*, 67

7. The prisoner had in his possession a note which had been lost for two days. Upon the trial of the

prisoner for felony, the jury were directed, that if they were of opinion that at the time when the prisoner first resolved to appropriate it to his own use he knew the owner, or believed that he could be found, they were to find him guilty. Held, an erroneous direction, as it was possible that the prisoner might for some time have had honest possession of the note, in which case a subsequent conversion would not amount to larceny.

Reg. v. Preston, 641

8. A clerk, who receives money or goods directly from his master for a special purpose on behalf of his master, and appropriates them to his own use, is guilty of larceny and not embezzlement. *Reg. v. Hawkins*, 328

9. The prosecutors employed the prisoner (a butcher and drover) to take pigs and deliver them to A., and to bring back such sum, in post-office orders or a cheque, as A. should give him, on being shown by him a paper from the prosecutors. He had 2*l.* given him for his expenses, for which he was to account, but nothing was said of the manner in which he was to be paid for his trouble: there was an established custom to pay drovers so much by the day for the time they were employed. The prisoner was at liberty to drive cattle at the same time for others. He sold the pigs, and appropriated the proceeds to his own use. Held, that the prisoner was not a servant to the prosecutor. That, as a bailee, without proof that he intended to appropriate them to his own use at the time he received them, he could not be convicted of larceny. *Aliter*, if a servant. *Reg. v. Hey*, 209

10. The prisoner went away with the wife of the prosecutor, and took with him a box of his own in which he had assisted in placing property of the husband. He subsequently cohabited with the wife, used some of

the property, and pledged a portion, consisting of her wearing apparel, and appropriated the proceeds to his own use. Held, that he was properly convicted of larceny. *Reg. v. Thompson*, 294

11. Without feloniously obtaining possession there cannot be larceny. *Reg. v. Thistle*, 204

12. The prisoner was a shareholder in a public company, unincorporated, but authorized under the statute to sue or prosecute in the name of the treasurer; he was also a clerk to the company, appointed by the directors, who paid him his salary, and fixed the duties he had to perform. A cheque had been drawn in the name of the company, paid by the bankers, and returned by them, in the course of business, through a messenger to the prisoner, whose duty it was to hold such returned cheque for the use of the directors. The prisoner purloined the cheque. Held, that he was properly convicted of larceny. *Reg. v. Watts*, 342

Held, also, that he was properly convicted as servant to A. (the chairman of the directors), and others. *Ib.*

Where, according to the course of business, paid cheques are returned by the bankers to the directors of a company, they become their property, as directors. *Ib.*

The prisoner, as a shareholder, had no property in such a cheque. *Ib.*

13. The prisoner received various articles of clothing from his employer to sell about the country; to each article was affixed a separate price. The prisoner was to receive a commission upon the goods he sold, and to return the remainder. The prisoner fraudulently pawned some, and appropriated the rest to his own use. Held, that he was properly convicted of larceny. *Reg. v. Poyser*. 559

14. The prisoner was indicted for larceny. The jury found a verdict that the goods were parted with *conditionally*, that the money was to be paid at the time, and that the prisoner took them with a felonious intent. Held to amount to a verdict of guilty. *Reg. v. Cohen*, 576

15. The prisoners, J. and W., by a trick, in which they pretended to be ready and willing and about to pay over to the prosecutor forty-two sovereigns, induced the prosecutor to draw a cheque upon his banker for 42*l.*, and to give it to J. At the request of J. the prosecutor went with him to get the cheque cashed. The banker cashed the cheque to the prisoner in notes and gold, as directed by the prosecutor at the time. J. then by another trick got rid of the prosecutor. The jury found that the prisoners throughout intended to get the property of the prosecutor by fraud, and that the prosecutor did not intend to part with his property in the cheque and the money paid upon it until he received the forty-two sovereigns. Held, that the prisoners were properly convicted of larceny. *Reg. v. Johnson and another*, 612

16. Pigeons tame and reclaimed, kept in an ordinary dovecot, and having access to the open air, are the subject of larceny. *Reg. v. Cheafor*, 621

See EMBEZZLEMENT, 1.

See FALSE PRETENCES, 3.

LUNATIC.

Evidence of. See EVIDENCE, 13.

MARRIAGE.

Refusal by ministers to marry. See PLEADING, 13.

MARRIAGE LICENSE.

Obtaining license from surrogate.
See PERJURY, 1.

MASTER OR SERVANT.

See EMBEZZLEMENT, 1.

NIGHT POACHING.

Statement of close.

In an indictment for night poaching under stat. 9 Geo. IV. c. 69, it is not necessary to name any particular close; it is sufficient to say, "land in the occupation of B. or C.," as the fact may be. *Reg. v. Eaton*, 598

It is not necessary where several persons are indicted together that they should all have been upon the same parcel of land. *Ib.*

If several persons in one party are in parcels of land described in the indictment as in different occupations, it is within the statute. *Ib.*

NUISANCE.

A pauper who has not the means of burying his deceased child, and who refuses to accept *a loan* from the parish and apply it to that purpose, is not liable to be indicted for a nuisance arising from the decomposition of the child's body. *Reg. v. Vann*, 632

ORDER OF JUSTICES.

A *soldier*, who disobeys an order of justices to pay a certain sum per week to the mother of a bastard child, of which child he is adjudged to be the putative father, is liable to be indicted. [But see the subsequent Mutiny Act.] *Reg. v. Ferrall*, 290

PERJURY.

1. A. swore falsely before a surrogate, and thereby obtained a license for the marriage of B. and C., which license was not acted upon. Query:

Was A. guilty of perjury? *Reg. v. Chapman*, 90

2. Upon a trial of ejectment, in order to prove the copy of a will, P. swore that he had examined it with the original in the registry at L., and, in order to prove probate, swore that he had examined a memorandum at foot of the copy, with the entry in the account book at the same registry. This examination did not render the document legally admissible in evidence. The Judge offered to receive it; but it was withdrawn. P. had not made either examination. He was indicted for perjury and convicted. Held, that as the statements were made with a view to the document being received, and if received it would have been material to the issue, the conviction for perjury must be affirmed. *Reg. v. Philpotts*, 607

3. An arbitrator appointed under the County Court Act has no power to administer an oath. False swearing before such a person is not perjury. *Reg. v. Hallett*, 563

4. The prisoner was indicted for perjury. The indictment alleged that, upon a previous trial, in which the prisoner was a witness, she was asked (and it was a material question) whether she ever got *one* Milo Williams to write *a* letter for her; that she swore that she never got *a Mr.* Milo Williams (pointed out to her in Court, and who was proved to have written the letter) to write *a* letter for her. The letter was then shown to her, and she repeated her denial. Held, that the materiality was sufficiently alleged. That the allegation in reference to Milo Williams was sufficient. That the letter was sufficiently identified. *Reg. v. Bennett*, 567

PLEADING.

1. Certainty of statement of *locus*

ex quo under stat. 9 Geo. IV. c. 69.
See NIGHT POACHING, 1.

Stealing and receiving.

2. In charging in the same indictment under stat. 11 & 12 Vict. c. 46, s. 3, a receiving together with a stealing, the prosecution is not limited to one count for receiving. *Reg. v. Beeton*, 87

Deserting child of tender years.

3. An indictment for leaving and deserting an infant child of tender years, with intent to injure and aggrrieve the inhabitants of A., is not sufficient, there being no averment that the child was settled elsewhere, nor any allegation that the child received any damage or was likely to do so. *Reg. v. Cooper*, 126
See also INFANT.

Indictment for stealing coin described as "Goods and chattels."

4. An indictment charging the stealing "two pieces of the current silver coin of the realm called shillings, of the goods and chattels of S. F.," is sufficient; for that the words "of the goods and chattels" ought in such case to be rejected as surplusage. *Reg. v. Radley*, 144

5. In an indictment for larceny, "one ham of the value," &c. is a sufficient description. *Reg. v. Gallars*, 196

Indictment of a bankrupt for not disclosing his real estate.

6. An indictment under the stat. 5 & 6 Vict. c. 122, s. 32, charging a bankrupt that "at the time of his examination, to wit," &c., "he was possessed of a real estate, to wit," &c., and "that he at the time of his said examination," &c., "did not discover when he disposed of, assigned and transferred the said estate," &c., without averring that the bankrupt had disposed of, assigned or trans-

ferred the said estate, &c. Held insufficient. *Reg. v. Harris*, 177

Query, Whether an indictment under the same statute charging that the bankrupt "submitted himself to be examined," &c., and "that at the time of his said examination," &c., sufficiently alleges that the bankrupt was examined. *Ib.*

Omitting to state the false pretence.

7. An indictment charging that A. on, &c., in, &c., "did unlawfully attempt and endeavour fraudulently, falsely, and unlawfully to obtain from B. a large sum of money, to wit, the sum of 22*l.* 10*s.*, with intent thereby then and there to cheat and defraud the said B.," without stating the means adopted by the prisoner, was held insufficient, after conviction. *Reg. v. Marsh*, 192

Causing the death of an infant.

8. An indictment for causing (qy. not preventing) the death of an infant child, by a mere *non-feasance*, without any statement of the age, or incapacity on the part, of the child to take care of itself, is bad. Query, Whether describing it as an infant child, *of tender years*, is sufficient? But an indictment for causing the death of an infant child by a *misfeasance*, as casting and throwing on a heap of ashes (and leaving it there exposed, &c.) is sufficient, without any statement of the age, if the death of the child be traced to that act. "Not named," when consistent with the fact, is a sufficient description in such an indictment; *aliter*, not baptized. *Reg. v. Waters*, 57

9. *Semble*, in an indictment for an indecent exposure, it is sufficient to allege that A. B. "unlawfully, wilfully, publicly, and indecently did expose and exhibit," &c., "in the presence of" C. D., "and divers other liege subjects," &c. *Reg. v. Webb*, 23

Secreting letters by a person employed in the post office.

10. In an indictment upon the stat. 7 Will. IV. & 1 Vict. c. 36, s. 26, against a person employed under the post office, for secreted letters, it is not necessary to set out the purpose for which he secreted them. *Reg. v. Wynn*, 32

Moneys received by a collector of poor's rates.

11. Money received by a collector of the poor's rate is sufficiently described as the property of the overseers only;—naming them. *Reg. v. Adey*, 296

Setting out promissory note.

12. An indictment charging that A. unlawfully did falsely pretend that a certain printed paper was a good and valid promissory note, is sufficient, without setting out the paper. *Reg. v. Coulson*, 332

Refusal to marry.

13. Query, Whether a refusal by a minister of the established church to marry an applicant (all temporal formalities having been properly performed) on the ground that he has not been confirmed, and will express no desire to be confirmed, is an indictable offence? if so, in order to support the indictment, the parties must both have presented themselves, for the purpose of being married, within canonical hours. The indictment must aver that the parties might have been lawfully married. *Reg. v. James*, 300

14. Query, Whether the words "so as aforesaid feloniously stolen" necessarily mean that the goods were stolen by the person in the preceding count mentioned. *Reg. v. Craddock*, 361

15. Reference from one count to another. See VENUE, 2.

POACHING.

See NIGHT POACHING.

POINTS OF PRACTICE.

"A conviction" is a condition precedent in all cases to give jurisdiction to this Court, 289

The Court will not entertain any question which is not reserved in the case (p. 24), even though it should be fairly deducible from the case itself, 214

The Court will not consider an objection to the validity of an indictment if it be not reserved, and the indictment be not set out in the case itself, 24, 37

The Court upon a case reserved, on which the indictment is set out, will look at the indictment, and if bad reverse the judgment, 26, 37

The Court will also look at the indictment for the purpose of assisting their judgment, although it be not set out, 382

The Court will not go into any matter of evidence which occurred at the trial, if it is not referred to in the case, 214, 256, 346

The Court will not, except perhaps under extreme circumstances, send a case back to be amended, 40; 179, n.; 270, n.; 318, n.; 412, n.; 423, n.

The Court will not send a case back to be amended in order to raise a point (not reserved) whether a certain question should have been left to the jury, 214

Before a case is submitted to this Court counsel may apply to the Judge, by whom it is stated, to amend, 214, 347, n.

A case reserved in term after this Court has begun to sit, (usually the second Saturday in term,) properly belongs to the next rota, 270, n.

If a case reserved by a Judge of one of the superior Courts should be

called on when such Judge is not present, it will be adjourned until he be present; although a Judge who was present at the trial, and therefore acquainted with the facts, should be one forming this Court, and present when the case is so called on,

342; but see 286

An objection to an indictment raised in arrest of judgment may be submitted to this Court, 81

A point which has been decided upon demurrer in the Court below cannot be reserved for this Court,

179, note; 286

Semble, Where by arrangement no judgment is at the trial given upon a demurrer, which does not appear upon the record, and the case goes on, and the prisoner is convicted, the point raised upon demurrer may be reserved. [See *however, Rules of Court*, vii.] 155—288

One counsel only can be heard on each side (*but see* 457), 342

Counsel for the prisoner address the Court first, and have a reply.

This Court will consider the case reserved and give judgment, although no counsel should appear on either side.

Counsel will be heard in support of the conviction, although no counsel should appear on behalf of the prisoner, 81

So, by counsel for the prisoner, although no counsel should appear for the Crown.

Semble, There is no appeal from this Court by a writ of error, 286

Where a case is reserved a prisoner should not be discharged on his own recognizance, 506

Where a prisoner is found guilty against the evidence and against the direction of the Court, 291, 458

POISON.

To administer *coccus indicus* ber-

ries *with intent to kill*, is to administer poison within the statute 7 Will. IV. & 1 Vict. c. 85, s. 2; although the kernel only is poison and the stomach will not act upon the pod, and the whole is therefore innocuous. A person who at the same time administers a poison and its antidote, does not administer poison. (*per Alderson, B.*). *Reg. v. Cluderay*, 219

PRACTICE.

1. Upon a case reserved, where the indictment is included in the statement of the case, the Court may look at the indictment, and, if bad, reverse the judgment. *Reg. v. Webb*, 23

2. *Semble*, Upon a case reserved, the Court will not entertain a question as to a matter of error upon the record—the Court not being constituted for that purpose. *Reg. v. Wynn*, 32

3. Where a prisoner has been convicted, and a question of law reserved, this Court will hear counsel for the prosecution, although no one appears for the prisoner. *Reg. v. Martin*, 78

4. Where the prisoners have not been tried and convicted, this Court has no authority to hear, nor has the Judge below power to reserve, a case upon the validity of an indictment upon which he has already given judgment, even though the judgment should have been given expressly with a view to reserving the case. Under such circumstances the proper course for the prisoner is to bring a writ of error before the Queen's Bench. Where judgment is so given against a prisoner, this Court has no power to place him in the same situation that he was in before the demurrer. *Semble*, where (by arrangement) no judgment is, at the trial, given upon the demurrer, the case goes on and the prisoner is convicted,

the point raised upon demurrer may be reserved. (See, however, the Rules of Court, Appendix.) *Semble*, the judgment of this Court deprives the party of his writ of error. *Reg. v. Faderman*, 286

5. Where an objection, that the learned Judge at the trial did not leave a certain question to the jury has not been reserved, this Court will not send the case back to be amended in order to raise the point. This Court will not consider an objection which has not been reserved, even though it should be fairly deducible from the case itself. This Court will not go into any matter of evidence which occurred at the trial if it is not stated in the case. Before the case is submitted to this Court counsel may apply to the Judge, by whom it is stated, to amend. *Reg. v. Smith*, 214

6. Where a prisoner was indicted for stealing certain goods, and in a subsequent count for receiving the said goods "*so as aforesaid feloniously stolen*," &c.: and the jury acquitted of the stealing and convicted of the receiving, the conviction was affirmed upon a case reserved upon a motion in *arrest of judgment*. *Reg. v. Craddock*, 361

Where the receiving is so laid, the Judge should direct the jury to acquit upon the count for receiving, if they should not find the prisoner guilty of stealing. *Ib.*

7. The Court, for the purpose of assisting its judgment, will look at the indictment, although it be not set out in the case. *Reg. v. Williams*, 382

8. Upon the cross-examination of a witness for the prosecution, counsel for the prisoner ought not to be allowed to put the depositions into the witness's hands and ask him if he persists in the statement he has al-

ready made in his evidence in court. *Reg. v. Ford*, 573

9. When a prisoner is charged with a felony committed after a previous conviction, and also with the previous conviction, the prisoner is to plead to the whole indictment; the jury are first to inquire into the felony *only*; afterwards the previous conviction. The practice is in substance the same as it was before the statute 14 & 15 Vict. c. 19. *Reg. v. Shuttleworth*, 626

PREVIOUS CONVICTION.

Where a counsel for a prisoner on cross-examination of a witness for the prosecution adduces evidence of good character for a limited time prior to the prosecution, the counsel for the prosecution may give in evidence a previous conviction, although it did not occur within the time to which the cross-examination was limited; but it would be otherwise if the witness volunteered the statement. In the former case the prosecution would not be entitled to a reply. In the latter case he would not be entitled to give evidence to rebut the voluntary statement. *Reg. v. Shrimpton*, 628

See PRACTICE, 9.

RECEIVING.

1. An indictment charged the prisoner with receiving certain fowls knowing them to have been stolen. The fowls had been stolen at M. by the prisoner's husband, and by him sent by coach to B. The prisoner went to the coach office at B., and claimed the hamper or box in which they were packed. It was not delivered to her. She was then taken into custody. Held, that the prisoner was improperly convicted of receiving. *Reg. v. Hill*, 150

2. A wife cannot, jointly with her husband, be convicted of receiving stolen goods.

Where both found guilty on a joint indictment, the conviction of the husband affirmed; of the wife, quashed.

Reg. v. Matthews, 337

3. A. received from the thief. B. subsequently received from A. Held, that B. could not be convicted upon a count charging a joint receiving by A. and B. *Reg. v. Gray,* 411

4. Several counts for receiving. See PLEADING, 2.

5. Corrupt receiving of money under the statute 7 & 8 Geo. IV. c. 29, s. 58. See CORRUPT RECEIVING OF MONEY.

6. Evidence of a receiving. See EVIDENCE, 7, 12, 14.

JOINT-RECEIVING.

See RECEIVING, 2, 3.

ROBBERY.

See ASSAULT, 1.

RULES AND ORDERS OF COURT.

See APPENDIX, vi.

SECRETING LETTERS.

See PLEADING, 10.

SEDUCTION.

See CONSPIRACY TO PRODUCE DEFILEMENT.

SERVANT.

A collector of poor's rates, employed by the overseers, is properly charged with embezzlement, *as servant* to the overseers, although there are churchwardens for the same parish, who took part in making the rates. *Reg. v. Adey,* 296

A collector of poor's rates, as a servant to the overseers, has *authority* to receive the rates from the landlord if he will pay them to him. *Ib.*

Semble, he would have *authority* to receive them from any person who would pay them to him. *Ib.*

See EMBEZZLEMENT, 1.

See LARCENY, 8, 11.

SEXUAL INTERCOURSE.

See ASSAULTS, 3, 4.

SHAREHOLDER.

See LARCENY, 11.

SHED.

See ARSON.

SHOOTING WITH INTENT TO PREVENT AN ESCAPE.

The prisoner (a constable), guarding a copse, saw A. stealing wood therefrom. The prisoner shot at A. as the only means of preventing his escape. A. had before been repeatedly convicted of stealing wood, but those convictions were unknown to the prisoner. The prisoner was convicted of shooting with intent, &c. Held, that he was properly convicted, *as,* at the time, he did not know that A. had committed a *felony*. *Reg. v. Dadson,* 385

SODOMY.

Consentient convicted, agent being 12 years of age. *Reg. v. Allen,* 55

SOLDIER.

See ORDER OF JUSTICES.

STATUTES.

53 Geo. III. c. 127, s. 7, (and 27 Geo. II. c. 20). Levy of church rate.

Reg. v. Williams, 235

7 & 8 Geo. IV. c. 29, s. 8. Threatening letter. *Reg. v. Smith,* 214

7 & 8 Geo. IV. c. 29, s. 53. Obtaining money by false pretences.
Reg. v. Jones, 270

7 & 8 Geo. IV. c. 29, s. 58. Corrupt receiving of money.
Reg. v. Pascoe, 141

9 Geo. IV. c. 69. Night poaching.
Reg. v. Eaton, 598

11 Geo. IV. & 1 Will. IV. c. 66. Warrant order or request.
Reg. v. Illidge, 127
Reg. v. Dawson, 428

11 Geo. IV. & 1 Will. IV. c. 66, s. 24. Venue in forgery.
Reg. v. Smithies, 190

1 Will. IV. c. 66, s. 19. Engraving bill of exchange, &c.
Reg. v. Faderman, 286

7 Will. IV. & 1 Vict. c. 26, s. 6. Secreting letters by persons employed in post offices.
Reg. v. Wynn, 32

7 Will. IV. & 1 Vict. c. 85, s. 2. Administering poison.
Reg. v. Cluderay, 219

7 Will. IV. & 1 Vict. c. 85, s. 11. Where the offence charged shall include an assault.
Reg. v. Bird, 448

5 & 6 Vict. c. 122, s. 32. Bankrupt not disclosing his real estate.
Reg. v. Harris, 177

7 & 8 Vict. c. 66, s. 16. Jury *de medietate lingue*.
Reg. v. Manning & Wife, 155

11 & 12 Vict. c. 42, s. 17. Depositions. *Reg. v. Christopher and others*, 225

11 & 12 Vict. c. 42, s. 18.
Reg. v. Sansonee, 260

11 & 12 Vict. c. 46. Receivers.
Reg. v. Martin, 78
Reg. v. Beeton, 87

11 & 12 Vict. c. 78. Constituting Court of Criminal Appeal. See Statute, App. i., and see *Reg. v. Masters*, 1
Reg. v. Martin, 78

and see below, "INTERPRETATIONS UPON THE STATUTE."

12 & 13 Vict. c. 76. Procuring defilement of young women.
Reg. v. Mears, 414

14 & 15 Vict. c. 19, s. 9. Previous conviction. *Reg. v. Key*, 623
Reg. v. Shuttleworth, 626

Evidence of Character.
Reg. v. Shrimpton, 628

STATUTES, SECTIONS OF, ABSTRACTED.

27 Geo. II. c. 20, s. 1. Distress for church rates, 237

38 Geo. III. c. 52. Indictments for offences committed within the county of any city or town corporate may be preferred at any sessions in county next adjoining, 83

53 Geo. III. c. 127, s. 7. Distress for church rates, 238

5 Geo. IV. c. 83, s. 4. Indecent exposure of person, 24

7 Geo. IV. c. 64, s. 12. Offences committed within 500 yards of boundaries of counties, &c. 278

7 Geo. IV. c. 64, s. 14. Statement of name of owners upon an indictment for larceny, 406

11 Geo. IV. & 1 Will. IV. c. 66, s. 24. Venue in forgery, 190

7 Will. IV. & 1 Vict. c. 36, s. 26. Stealing or secreting letters by persons in the post office, 33

7 Will. IV. & 1 Vict. c. 85, s. 2. Administering with intent to poison, 220

7 Will. IV. & 1 Vict. c. 85, s. 11. When the offence charged shall include an assault, 448

2 & 3 Vict. c. 82, s. 1. Offences committed within a detached part of a county, inquired of, by justices in surrounding county, 84

11 & 12 Vict. c. 42, s. 17. Depositions of persons ill admissible, 9

11 & 12 Vict. c. 42, s. 18. Caution to prisoner before statement by him, 249

11 & 12 Vict. c. 46, s. 3. Counts for receiving, with counts for stealing, 87

12 & 13 Vict. c. 76, s. 1. Procur- ing defilement of young women, 419

INTERPRETATIONS UPON THE STATUTE CONSTITUTING THE COURT OF CRIMINAL APPEAL.

The word "conviction" in the statute means conviction *upon trial*, 289

The words of the Stat. 11 & 12 Vict. c. 78, s. 1, "Question of law which may arise *in criminal trials*" include a question upon the validity of the indictment raised after verdict, and in arrest of judgment. *Reg. v. Martin*, 78

Semble, the words "any questions of law which shall have arisen upon the trial," will be taken to mean any questions arising from the time of the arraignment to the sentence, 81, 86, 155, 580 (*see* 647.)

The only way in which this Court can "avoid" a judgment of a Court below is to order a verdict of "Not guilty" to be entered, 291

The Recorder of a borough is a "Justice of the Peace" within the meaning of the statute, and has power to reserve a case.

TENDER.

See EVIDENCE, 11.

THREATENING LETTER.

A letter containing an assertion that mischief will happen, which the writer will not prevent unless he receives a sum of money, is a threatening letter within the statute 7 & 8 Geo. IV. c. 29, s. 8. *Reg. v. Smith*, 214

VENUE.

Uncertainty as to the county in which the money was abstracted.

1. The prisoner and his master lived at Nottingham. The prisoner received money on his master's account at Derby, for which he should have accounted to his master in the course of the week. He did not, nor did his master hear of him till two months after, when they met in Nottingham. The prisoner then said he had spent the money. *Held*, that there was evidence from which the jury might find that the prisoner embezzled the money in Nottingham. *Reg. v. Murdock*, 604

By reference from one Count to another.

2. Words in one count referring to another count include so much only of the other count as is specially referred to; and, therefore, where a person was indicted in the seventh count in an indictment for receiving in the county of Somerset one wether sheep ("being the same as is mentioned in the fifth count of this indictment"), in which fifth count the said wether sheep was alleged to have been stolen in the county of Dorset; the fifth count is not so incorporated with the seventh as to show jurisdiction to try in the county of Dorset.

Nor will the Stat. 11 & 12 Vict. c. 46 (which provides that accessaries after the fact may be tried by any court having jurisdiction to try the principal felon) assist; the seventh count, neither in itself, nor by reference, averring who was the principal to whom the prisoner was accessory. *Reg. v. Martin*, 78

Where money obtained by false Pretences, and forwarded through the post.

3. A. obtained money by false pretences; it was forwarded by post as requested by him. *Held*, that he constituted the post-master, where the letter was posted, his agent for the

receipt of the money, and was therefore properly indicted in the county in which such post-office was situated. *Reg. v. Jones,* 270

Where document forged.

3. Upon a trial for forgery at common law a verdict of "*Guilty of forging, but there is no evidence of its having been done within the jurisdiction of the Court,*" amounts to a conviction. *Reg. v. Smithies,* 190

WARRANT ORDER OR REQUEST.

See FORGERY, 1, 3.

WARRANT ORDER AND REQUEST.

See FORGERY, 4.

WARRANT TO LEVY.

See CHURCH RATES.

WRIT OF ERROR.

See ERROR.

